

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	
W.R. GRACE & CO., <i>et al.</i> ,	.	Case No. 01-01139 (JKF)
	.	Jointly Administered
Debtors.	.	
	.	Aug. 21, 2006 (1:55 p.m.)
	.	(Wilmington)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 THE COURT: These are all Mondays: January 22nd,
2 February 26th, April 2 - Now, my calendar says that Passover
3 begins on April 3, so, does April 2 cause a problem?

4 UNIDENTIFIED SPEAKER: It may.

5 UNIDENTIFIED SPEAKER: Some calendars publish it the
6 night before and some have it the first day.

7 MR. BAENA: My guess is that's the first day,
8 Judge, not the first night.

9 UNIDENTIFIED SPEAKER: So, the result of that would
10 be -

11 THE COURT: Well, I don't - I think it's the first
12 day because it's in the, you know, the Christian Holy Week,
13 and Good Friday is that Friday, Passover is listed on
14 Tuesday, so my guess is that that's the first day.

15 MR. BAENA: Which means we would observe the night
16 before.

17 THE COURT: The night before. What time do you need
18 to be out of -

19 MR. BAENA: We have to be there by sundown.

20 THE COURT: So, could you participate by phone, if
21 necessary, for that one?

22 MR. BAENA: Sure.

23 THE COURT: Or do you want me to put it on -
24 because you couldn't be here on the 3rd, either; correct?

25 MR. BAENA: That is correct. We could, assuming

1 nothing will be scheduled in respect of our clients that
2 needs to be argued first.

3 THE COURT: I couldn't hear you, Mr. Baena, assuming
4 that what?

5 MR. BAENA: Assuming that nothing is scheduled in
6 respect of our clients that we would have to argue in person.
7 If we could avoid that, that's fine.

8 THE COURT: The 2nd, April 2nd, Monday. Okay, that's
9 fine. Why don't we plan it for April 2nd. If it turns out to
10 be a problem, then we'll figure it out, I guess, closer to
11 then. Okay, so let me repeat what I've got so far, and then
12 I'll keep going. January 22nd, February 26th, April 2, April
13 30, May 21, June 25th you already know about, that's the one
14 that will be in Pittsburgh because we're going to be in the
15 middle of the many trial days in this case. July 23 - I
16 don't have an August date yet. I will give you that next
17 month. September 24, October 22, November 26th, and December
18 17, and I may do December 17 in Pittsburgh, I'll figure that
19 out closer to then and see how active the cases still are at
20 that point in time. Any problems that anybody's aware of
21 with any of those dates except for the April 2nd date? Okay.
22 Well, if need be, we'll either do that by phone or change
23 that date as the time approaches. Okay, then Monday at 1:30
24 starting in January will be the Grace dates. Are they
25 connected, Jason? Can I call the case? Okay. This is the

1 matter of W.R. Grace, Bankruptcy No. 01-1139. The parties I
2 have listed by phone are: Paul Sadler, Christina Kang,
3 Richard Rescho, Paul Norris, Mark Shelnitz, David Siegel,
4 Natalie Ramsey, Brian Kasprzak, Mark Plevin, Leslie Epley,
5 Elizabeth DeChristofaro, Andrew Chan, Stephen Vogel, Kathleen
6 Farinas, Eric Manchin, Tiffany Cobb, Robert Guttman, Michael
7 Davis, Jeramy Kleinman, Joseph Radecki, Jonathan Brownstein,
8 Edward Westbrook, Curtis Plaza, Matthew Kramer, Darrell
9 Scott, Sean Walsh, Elizabeth Cabrasor, Richard Park, Carl
10 Pernicone, Stephanie Kwong, Arlene Krieger, Guy Baron, Sander
11 Esserman, David Parsons, Lori Sinanyan, Ted Freedman - but I
12 see him in court, John O'Connell, Barbara Harding, Sam
13 Blatnick, Barbara Seniawski, Andrew Craig, Lynne Nissen,
14 Daniel Glosband, Marti Murray, David Liebman, Jacob Cohn,
15 Craig Gilbert, Peter Shawn, Daniel Cohn, Debra Felder, David
16 Austern. I'll take entries in court, please.

17 MR. BERNICK: Good afternoon, Your Honor. David
18 Bernick for Grace.

19 MS. BAER: Janet Baer on behalf of Grace.

20 MR. O'NEILL: James O'Neill for Grace.

21 MR. BECKER: Gary Becker on behalf of the Equity
22 Committee.

23 MR. PASQUALE: Ken Pasquale from Stroock for the
24 Unsecured Creditors Committee.

25 MR. KRUGER: Lewis Kruger also from Stroock for the

1 Unsecured Creditors Committee.

2 MR. RESTIVO: James Restivo, Reed Smith for Grace.

3 MR. BAENA: Scott Baena on behalf of the Property
4 Damage Committee.

5 MR. SAKELO: Jay Sakelo on behalf . . . (microphone
6 not recording).

7 MR. LOCKWOOD: Peter Lockwood on behalf of the
8 Asbestos Claimants Committee.

9 THE COURT: Excuse me one second. Okay, thank you.
10 After Mr. Lockwood?

11 MR. HORKOVITCH (phonetical): Thank you, Your Honor.
12 Bob Horkovitch, insurance counsel for the Personal Injury
13 Claimants Committee.

14 MR. WYRON: Richard Wyron for the Future Claimants
15 Representative.

16 MR. SPEIGHTS: Dan Speights on behalf of S&R
17 Claimants.

18 MR. DIES: Martin Dies, Your Honor, on behalf of my
19 claimants and also as Special Counsel for the PD Committee.

20 MR. WISLER: Your Honor, I'd like to enter my
21 appearance. Jeffrey Wisler -

22 THE COURT: Sir, I can't hear you, I'm sorry.

23 MR. WISLER: Jeffrey Wisler appearing on behalf of
24 the Asbestos Claimants Committee.

25 MR. HURDFORD: Mark Hurdford of Campbell & Levine on

1 behalf of the Claimants Committee.

2 MS. McGONIGLE: Patricia McGonigle, the
3 SimmonsCooper Claimants, Your Honor.

4 THE COURT: I'm sorry, who are you representing?

5 MS. McGONIGLE: The SimmonsCooper PI plaintiffs.

6 MR. PHILLIPS: Robert Phillips, SimmonsCooper
7 Claimants, Your Honor.

8 MS. PULLECK: Laure Pulleck, Prudential.

9 MR. BURNHAM: Noel Burnham for Grace Certain Cancer
10 Claimants.

11 MR. HOGAN: Good afternoon, Your Honor. Daniel
12 Hogan on behalf of the Canadian Zonalite Claimants as well as
13 Brayton Purcell Ford & Noms (phonetical) and various other
14 law firms, Your Honor.

15 MR. MONACO: Your Honor, good afternoon. I'm Frank
16 Monaco for the Crown.

17 THE COURT: I like it when you do the whole thing,
18 Mr. Monaco.

19 MR. MONACO: I'm here in short, Your Honor.

20 THE COURT: Okay, Mr. Bernick.

21 MR. BERNICK: Good afternoon, Your Honor. We're
22 going to try to get through the - well, I think essentially
23 ministerial matters which will be items 1, 2, 3, and 5.
24 We're going to propose deferring argument on item 4, which
25 relates to the approval of a settlement because it only

1 involves - I think there are limited numbers of people who I
2 think will be focused on that because we'd like to get to the
3 meat of where we are with the property damage and personal
4 injury litigation tracks, and therefore, Ms. Baer is going to
5 handle the items that I've indicated, but then our goal would
6 be to start up with item 6 on the agenda which relates to the
7 Canadian claims. So, Ms. Baer will handle the first four -
8 actually 1, 2, 3, and 5, we seek to defer 4, and then
9 starting with 6.

10 THE COURT: All right.

11 MS. BAER: Your Honor, with respect to item number
12 1, that's just the debtor's fifth omnibus objection. We have
13 one claim left, and we are continuing it. Items 2 and 3 are
14 the New Jersey injunction and adversary proceeding. By
15 agreement with the State of New Jersey, we're continuing
16 those. So I have orders to hand up on both.

17 THE COURT: All right. Thank you. Okay, they're
18 continued.

19 MS. BAER: Your Honor, that takes care of 1, 2, and
20 3. Item 4 is the Lloyd's Underwriters settlement which we'll
21 defer to the end of the hearing. Item number 5, Your Honor,
22 was the debtor's objection to the claim of David Slaughter.
23 Your Honor, David Slaughter's counsel for the first time did
24 now submit some evidence in support of his claim. We've
25 agreed that we will send this claim to mediation. I've

1 spoken with Mr. Slaughter's counsel. He's agreeable to that.
2 So, if Your Honor would like, we can present an order.
3 Effectively the claims objection stands but the merits will
4 be addressed in mediation, and we'll come back and put it on
5 the agenda once that's concluded.

6 THE COURT: All right, that's fine.

7 MS. BAER: Do you need an order for that, Your
8 Honor?

9 THE COURT: Probably because otherwise it's just
10 going to stand out there unless I just give you a general
11 continuance so that you can put this back on the agenda when
12 it's ready. That's fine with me.

13 MS. BAER: That would be fine.

14 THE COURT: Okay. Let me just make a note then.
15 Item 5 is continued, and debtor to put back on the agenda
16 when appropriate.

17 MS. BAER: Your Honor, that takes us to item 6,
18 which Mr. Bernick will address.

19 THE COURT: Okay.

20 MR. BERNICK: Your Honor, at the conclusion of the
21 discussion during the last hearing it concerns our request to
22 have the objections with respect to the Canadian claims heard
23 in the first instance in Canada, posed two very specific and
24 related questions that pertained, I think essentially, to
25 jurisdictional matters, and I want to go over the answers to

1 those this afternoon a little bit. The two related questions
2 were, number one, what is the jurisdiction of the Canadian
3 Court to do what it is that we would ask them to do, and the
4 second related question is, how does the deployment of that
5 jurisdictional grant, if we can demonstrate that it exists,
6 square with U.S. law principles relating to whether Your
7 Honor should exercise what is clearly Your Honor's power to
8 adjudicate the same matters. So they're two tied together,
9 they both focus on jurisdiction. Taking a look at the briefs
10 that have been filed since that time, and I think that with
11 the benefit of hindsight Your Honor was very accurate in
12 seeing that the issues were not completely fleshed out in the
13 first round of briefing, but looking at the briefs that have
14 been filed since, it is apparent that part of the problem
15 here is that the property damage constituency, it really is
16 Mr. Speights, it is his claims that are issue in Canada or
17 claims of his clients, it analyzed the jurisdiction of the
18 Canadian proceeding in the Canadian Court as if they were
19 looking at a typical jurisdictional question arising
20 concerning an Article 3 or Bankruptcy Court here in the
21 United States. That is, they sought to apply an analytical
22 framework or template that's driven by questions that are -
23 sound very familiar under U.S. jurisdictional principles, but
24 have almost no relationship to the jurisdictional grant that
25 was explicitly made by the Canadian statute - Canadian law

1 that we're talking about, when we're talking about the
2 jurisdiction of the Canadian court, we're not talking about
3 U.S. jurisdictional principles, we're talking about Canadian
4 law jurisdictional principles, and the only source of the
5 Canadian law relating to those jurisdictional principles is
6 (a) the statute itself that confers power upon the CCAA
7 proceeding and secondly, decisions of the Canadian Courts
8 interpreting that statute and applying that statute in the
9 context of actually pending CCAA cases. If Your Honor take a
10 look at the language of the statute and takes a look at the
11 language of the cases, it's very apparent that the
12 jurisdiction that was conferred and has been exercised by the
13 CCAA courts in this particular area is a very distinctive
14 kind of jurisdiction. It is not a standalone jurisdiction.
15 It is an ancillary or assistive jurisdiction. That is to
16 say, the Canadian law grants to the Canadian courts the
17 power, the jurisdiction to stand in assistance of a
18 proceeding that's underway elsewhere, in this case, in the
19 United States. So, there are really four key properties that
20 relate to this jurisdictional grant that have to be
21 specifically articulated. One is the jurisdiction is an
22 ancillary jurisdiction. It's in an assistive jurisdiction.
23 That comes right out of the language of the CCAA itself where
24 it talks in Section 18.6(4). Nothing in this section
25 prevents the Court on application of a foreign representative

1 or any other interested person from applying such legal and
2 equitable rules governing the recognition of foreign solvency
3 orders and assistance to foreign representatives that are not
4 inconsistent with the provisions of this Act. If you look at
5 Section 18.6(2), which talks about the powers of the court,
6 again very much similar language. The purpose is to
7 facilitate, approve, or implement arrangements that will
8 result in coordination of proceedings under this Act with any
9 foreign proceeding. So, the jurisdiction is not the
10 jurisdiction of the court that's acting on its own and
11 necessarily even with respect to its own debtor. It is
12 acting in service of the jurisdiction of a foreign proceeding
13 properly before a foreign court. That's principle number
14 one. Number two, it need not be a bankruptcy case. CCAA
15 proceedings can involve bankruptcy but they need not involve
16 bankruptcy. There doesn't have to be a separate debtor in a
17 separate proceeding. And what we've seen in the cases is
18 that is exactly so. The CCAA proceedings have been used
19 with respect to companies or entities that are not debtors
20 and certainly do not have to be debtors, the same debtor that
21 is the subject of a U.S. or other foreign proceeding. The PD
22 Claimants or I guess Mr. Baena's firm on behalf of Mr.
23 Speights suggests that the only way that the CCAA proceeding
24 can be used is if Grace U.S., the debtor in this case, were
25 to file a, quote, "parallel proceeding in Canada". That's not

1 so, and the case law is clear that there does not have to be
2 a debtor. In fact a judge in the Babcock & Wilcox decision,
3 which we have quoted to the Court, Babcock & Wilcox Canada
4 Limited, decided by Judge Farley on February 25 of 2000, says
5 that, Unlike 18.6(2), 18.6(4) does not contemplate a full
6 filing under the CCAA. Rather, 18.6(4) may be utilized to
7 deal with situations where notwithstanding that a full filing
8 is not being made under the CCAA, ancillary relief is
9 required in connection with a foreign proceeding. So you
10 don't have to have Grace, or for that matter any other debtor
11 actually filing in Canada. Again, a principle that the PD
12 claimants do not come to grips with. Third property, the
13 power that's conferred by this statute is broad and it is
14 flexible. The language itself is broad and to serve the
15 purposes of the grant, the power must be broad because it is
16 essentially an ancillary or an assistive power with respect
17 to what may be a whole range of very diverse proceedings
18 taking place elsewhere. It's not so constrained. And
19 finally, in order to invoke or to trigger the CCAA process,
20 it is not necessary for a debtor to act. It could be any
21 interested person. That's exactly what the language of
22 18.6(4) says, and that's exactly what was done in this case.
23 The PD claimants make it seem as if the CCAA proceeding,
24 actually a proceeding initiated by Grace Canada, is somehow a
25 debtor entity. It could have been any interested party. The

1 point is not who initiates it. The point is that once it is
2 initiated, the touchstone for what the Court is empowered to
3 do is the broad language of the Canadian statute that then
4 says, You can do whatever it is that we'll assist the
5 proceedings taking place abroad. So in this case, Grace
6 Canada made the request that could have been made by others,
7 and the touchstone is not Grace Canada. The Canadian case is
8 not the Grace Canada case. The Canadian case is a case filed
9 or petitioned and prompted in Canada that is ancillary to
10 this Court's proceedings.

11 THE COURT: Wait, I'm sorry. What is the Canadian
12 case again?

13 MR. BERNICK: The Canadian case is not - it was
14 initiated at the request of Grace Canada, but it's not a case
15 that is confined to Grace Canada.

16 THE COURT: Oh, so you're not asking to have these
17 claims adjudicated within the Grace Canada case. You're
18 going to file an ancillary claim asking the Canadian Court to
19 adjudicate the case, the claims in this case.

20 MR. BERNICK: The proceeding has already been
21 initiated by Grace Canada. In other words, that proceeding
22 is an ongoing proceeding today in Canada. We're going to ask
23 that that Court take up the issue at the request of Grace
24 U.S. pursuant to its ancillary powers and resolve the
25 objection, that is, decide the objection subject then to Your

1 Honor's determinating what to do with it. In other words,
2 let's be very clear, the proceeding was initiated as it could
3 be by any interested party, in this case it was Grace Canada,
4 but because it's not a bankruptcy proceeding, the case is not
5 defined by Grace Canada.

6 THE COURT: But why is Grace Canada the interested
7 party. I'm sorry for interrupting, but I'm a little -

8 MR. BERNICK: Sure.

9 THE COURT: - confused about the status of these
10 cases. Why is Grace Canada the interested party moving to
11 have the Canadian Court exercise ancillary jurisdiction over
12 claims filed in the Grace U.S. cases?

13 MR. BERNICK: In this particular instance, I want to
14 distinguish between the request that gave rise to the fact of
15 there being a proceeding in Canada. That was an earlier
16 request made back, I think, in 2001, 2002 by Grace Canada.

17 THE COURT: Yes.

18 MR. BERNICK: And I think matters have already been
19 taken up by that Court in connection with this case, but they
20 had not required Your Honor's attention, and they haven't
21 related to the merits of claims made against Grace U.S. What
22 we are now doing is asking that Your Honor allow us to make a
23 request of the same Court sitting in that proceeding to take
24 up now a new issue. And that issue, the Court in Canada will
25 have the jurisdiction to pass on because of the statute that

1 confers ancillary jurisdiction or assistive jurisdiction on
2 the Canadian Court. In other words, that Court stands there
3 in service of the U.S. proceeding. In this and in many other
4 cases, the proceedings have been initiated and then issues or
5 requests are made to the Canadian Court as the U.S. case
6 progresses. It is an ancillary proceeding, and the Court - I
7 want to get to the question that Your Honor asked is, what is
8 the power of the Canadian Court? The Canadian Court's power
9 is spelled out in the statute, is a broad assistive ancillary
10 power. All you do is go to the language of 18.6, and I can
11 read to you again or point it out on the screen, the language
12 says that the proceeding itself in Canada can be initiated on
13 application when a foreign representative or any other
14 interested person -

15 THE COURT: Right. I don't dispute the language of
16 the statute. I think what I'm not clear about is why these
17 claims would be adjudicated within the context of the Grace
18 Canada case as opposed to being adjudicated within the
19 context of the Grace U.S. case but in a Canadian court that's
20 exercising ancillary jurisdiction. I don't understand the
21 relationship between taking -

22 MR. BERNICK: (Microphone not recording.)

23 THE CLERK: Mr. Bernick, we can't hear you without a
24 microphone. Do you want to take this, sir?

25 MR. BERNICK: Oh. Thanks.

1 THE COURT: I guess I'm asking, I don't understand
2 why the vehicle is the Grace Canada case.

3 MR. BERNICK: Because it's already there. In other
4 words, the distinction that Your Honor has drawn, I think, is
5 a distinction without a difference under the statute. The
6 proceeding has been initiated. The question now is what is
7 it going to do? And what it's going to do depends upon what
8 it is asked to do. The Canadian statute gives power to the
9 court sitting in that case to do lots of different things.
10 Grace Canada already made a request that gave rise to that
11 proceeding in the first instance. We are now making a
12 request -

13 THE COURT: Who's the "we"?

14 MR. BERNICK: The "we" is Grace U.S.

15 THE COURT: All right.

16 MR. BERNICK: So, Grace U.S. is now making a request
17 of this Court to approve our seeking to ask that Canadian
18 Court to exercise its ancillary jurisdictional power to
19 decide or to adjudicate in the first instance the claims that
20 we're talking about because they involve Canadian law. And
21 I'm going to go over the order that we're proposing as a
22 consequence of this. The Canadian Court, if Your Honor were
23 to approve this, we would make the request and the Canadian
24 Court would go about the process of addressing these claims.
25 The Court would then make a decision, but the decision under

1 this order and as we look at U.S. law would not be binding on
2 Your Honor with respect to the ultimate allowance or
3 disallowance of the claim. If there were some defect in the
4 Canadian proceeding or something else that said it would be
5 inappropriate now if you take the result of that proceeding
6 and make it binding in the sense of allowing or disallowing
7 the claim, Your Honor would retain the jurisdiction precisely
8 for that purpose, and that's what our draft order would so
9 provide. So, effectively, what are we really doing? We're
10 saying there's a statutory grant of very flexible power in
11 the Canadian court to do all kinds of things that stand in
12 service of this case. That proceeding already has been
13 initiated for other reasons. We now want to use the same
14 proceeding to encompass the decision of the interpretation
15 and application of Canadian law to these claims, which is
16 clearly within the purview of the statutory grant - that's
17 the question that Your Honor asked - and then with respect to
18 the U.S. side of the equation, we are not asking Your Honor
19 to either give up your jurisdiction or to abstain. We're
20 simply asking Your Honor to have the decision be rendered in
21 the first instance so that you can get, in a sense, the
22 advice of the Canadian court with respect to application of
23 Canadian law, and then with the benefit of that
24 determination, we would come back here and ask Your Honor to
25 give an enforcement. So we're not asking Your Honor to give

1 up your jurisdiction. We're not asking you to abstain.
2 We're simply asking you to use a facility which already is
3 there for purposes of applying Canadian law, and our order
4 would expressly so provide. Our proposed order would read as
5 follows: "Ordered that the debtors are authorized, pursuant
6 to the Canadian litigation protocol attached as Exhibit 2, to
7 prosecute their objections to the Canadian claims based upon
8 Canadian laws and facts before the Court in the CCAA
9 proceeding. Notwithstanding, the Court shall retain
10 jurisdiction over the Canadian claims for purposes of
11 estimation and/or determine the ultimate allowance or
12 disallowance of the Canadian claims. Number two, this Court
13 shall retain jurisdiction to hear and determine all matters
14 arising from the implementation of this order which is
15 final." So, Your Honor would basically be retaining control
16 and power over all of these claims but for purposes of
17 finding out how a Canadian court would construe and apply
18 Canadian law, you're allowing us to initiate a proceeding
19 over in Canada pursuant to the protocol that's attached here,
20 which is very simple and straightforward. It's essentially a
21 summary judgment process and if summary judgment fails, then
22 the matter is tried, and then the result comes back here for
23 Your Honor's disposition. I say that we believe that the
24 merit of this procedure is very obvious, and we've laid it
25 out in detail, and I'm not going to go through it in detail,

1 but you're talking about the application of Canadian law,
2 that's quite clear. It's quite clear the Canadian court
3 already has more experience than this Court obviously would
4 in applying Canadian law, and Canadian law is different, and
5 there's actually a track record, a very important track
6 record going back to 1995 in the Privus (phonetical) case
7 where an extended proceeding took place resulting in an
8 opinion over 300 pages long which dealt with the application
9 of Canadian law to asbestos property damage claims, and the
10 Court decided that Canadian law is different from U.S. law,
11 and those claims couldn't be pursued, and the result is that
12 there never has been since that time any Canadian property
13 damage litigation as a result of asbestos. It just hasn't
14 happened. So, what's happened is, that this matter now has
15 been taken back to the United States to be put before Your
16 Honor whereas the Canadian courts at least should have the
17 opportunity to tell the Court whether or not what we say is
18 true, which is they've already addressed this issue. Now,
19 Your Honor, we are more than content to have Your Honor take
20 up exactly the same matters. We're content to do the briefs
21 and get it done, the Canadian claims part of this process,
22 but we really do believe that this is the right way in which
23 to proceed because the matter involves Canadian law and also
24 because we believe that Your Honor has access to a court both
25 with the power and the competence to take on an issue that

1 Your Honor then would not have to decide in the first
2 instance.

3 THE COURT: Well, I sort of understand the
4 application of Canadian law in the summary judgment context.
5 I'm sort of losing it in the trial context because I'm not
6 sure how, if the cases are actually tried, I can retain any
7 jurisdiction to somehow or other act like an appellate court
8 and decide to set aside those rulings. If the Canadian court
9 gives me some final ruling on what the application of
10 Canadian law is, then I think I have to accept that
11 application of Canadian law; don't I?

12 MR. BERNICK: Well, part of me says, Yeah, sure, go
13 right ahead and say that's exactly right, but I really think
14 that this is part of why the Canadian procedure here and the
15 Canadian jurisdiction, the jurisdictional grant, is a little
16 bit different in a sense less aggressive than that because
17 you could do that. You could say, Well, assume that the
18 Canadian Court could acquire power over Grace U.S. That is
19 that Grace U.S. would accept the jurisdiction or submit
20 itself to the jurisdiction of the Canadian courts. Your
21 Honor could ship the whole thing out there and say, Tell me
22 what the answer is and it's fully binding. What we're saying
23 is that that is not necessary under the CCAA proceeding.
24 That is to say, under the CCAA proceeding Your Honor doesn't
25 have to give up power over these claims. This is no

1 different than Your Honor deciding really with respect to any
2 foreign proceeding whether or not you believe it's
3 appropriate to accept the outcome of that proceeding as being
4 binding here. The Canadian court under our order would only
5 be deploying an ancillary power that it enjoys under its
6 statute. It would not be acting as a separate proceeding
7 with the power finally to bind either Grace U.S. or finally
8 bind the Canadian claimants against Grace U.S. The
9 determination would not be binding in a sense on either side
10 until Your Honor says it's going to be binding on either
11 side. And in that respect, the Canadian statute doesn't
12 require and we're not asking Your Honor to give up your
13 ultimate say so about what to do with these claims. You're
14 essentially referring them out to the Canadian court, which
15 is willing to do this, to do the work of analyzing Canadian
16 law and applying it to the facts and saying, Here's what we
17 believe the Canadian law would say. And if it turns out that
18 they haven't done it right and there's a due process issue
19 and that there's a fundamental problem with giving weight and
20 effect to that ruling, all rights are preserved. They can
21 come back and ask Your Honor to say that it should have no
22 effect. I will say, Your Honor, that the Privus case, which
23 involved exactly the same issues, most courts in the United
24 States would not have gone this far as the Court in the
25 Privus case did. That was an unbelievably, exhaustively

1 litigated and detailed case. It was designed to decide the
2 matter pretty much for all time, and an unbelievable amount
3 of effort went into it. I don't think that there's really
4 anybody who's going to come in and say, Somehow the Canadian
5 courts aren't going to satisfy fundamental principles of due
6 process. There's certainly no evidence of it in connection
7 with the Privus case, but be that as it may, Your Honor
8 doesn't have to rule on that now because Your Honor retains
9 the jurisdiction to decide what to do. But again, let me
10 emphasize, we made this proposal because we thought it was
11 the right way to go. We made this proposal awhile ago. If
12 it's not going to work, Your Honor, it's not going to work,
13 and we're happy to make the Canadian cases part of the CMO
14 and take up these issues and have Your Honor interpret the
15 statute of limitations of Canada. We're happy to do it. We
16 just want to get it done and we want to get it done the right
17 way. So, this is something that Your Honor actually
18 mentioned awhile ago, saying maybe we'll do it in Canada. We
19 saw that, heard that, said, Gee, can we do it? We got
20 advice from Mr. Tay who's sitting here in court who's
21 Canadian counsel and has been intimately involved in these
22 different kinds of proceedings. So we think it can work. We
23 think this is the right way to go. So we've made the
24 proposal, Your Honor, but whatever Your Honor wants to do,
25 whether it's this or keeping the matters here and deciding

1 what the Privus decision meant, et cetera, et cetera, we're
2 happy to do it either way, but we wanted to at least present
3 an option to Your Honor so Your Honor could decide what to
4 do.

5 THE COURT: Well, I too would like to get the claims
6 adjudicated wherever they can be done the quickest. The
7 problem that I find with the process is that if it's going to
8 be a non-binding process, I'm concerned that I may end up
9 having to do it over again. I may not, but I'm uncomfortable
10 in the role of an appellate court. I don't see myself as a
11 court that's supposed to be taking a look at what the
12 Canadian court does and saying, Oh, I don't like that much,
13 therefore I'll set it aside. Or, gee, I think that's really
14 great, therefore I'll affirm it. I don't think that's my
15 role.

16 MR. BERNICK: Well, from Grace's point of view, we
17 represented before and we'll represent again, we're also
18 prepared to have the Canadian court's determination be
19 dispositive, that is, it would have the same force as Your
20 Honor's determination. That's not a problem from our point
21 of view.

22 THE COURT: Okay. Mr. Sakelo?

23 MR. SAKELO: Good afternoon, Your Honor. Jay Sakelo
24 on behalf of the Property Damage Committee.

25 MR. BERNICK: I'm sorry. Could I - I don't mean to

1 interrupt, Mr. Sakelo -

2 MR. SAKELO: No, that's okay.

3 MR. BERNICK: Mr. Sakelo's speaking for the Property
4 Damage Committee. The only claims at issue here are the
5 claims of Mr. Speights' clients. I can see how the Property
6 Damage Committee may want to give voice to its views, but we
7 really should be hearing from whoever it is that's
8 representing Mr. Speights' claimants. We've been told again
9 and again that when it comes down to individual claim
10 adjudication, we have to be dealing with counsel for the
11 claimants themselves.

12 THE COURT: Okay.

13 MR. SAKELO: Your Honor, when they filed their
14 original motion for a CMO on this new scheduling order, the
15 Committee filed a response and included in that response was
16 a simple response to the Canadian process they're trying to
17 employ which was, quite simply, you can't abstain. At the
18 last hearing you asked for additional briefing on that. We
19 undertook the briefing in the first instance and it made
20 sense to undertake the briefing in the argument in this
21 instance. So, with that, if I may proceed?

22 THE COURT: Well, I'm going to hear you because
23 frankly I can use any help on this issue I can get, but I
24 think Mr. Bernick does make a good point. The Property
25 Damage Committee has from the outset been telling me that you

1 don't represent individual claimants, and I take it you would
2 not be the entity that would be defending any objection to
3 these claims whether they're in Canada or in the United
4 States since they're objections to individual claims.

5 MR. SAKELO: That's correct, Your Honor. We're here
6 objecting to the process. All along we've been objecting to
7 the process that the debtors have been trying to employ in
8 respect to property damage claims generally.

9 THE COURT: All right.

10 MR. SAKELO: And this instance it just happens to be
11 Mr. Speights is the only one that filed those claims. Your
12 Honor, I find it interesting - I want to start on the Privus
13 decision because Mr. Bernick makes a lot of weight about the
14 fact that the Canadian courts already know what the law is up
15 there and it will be easy for them to apply that. What he
16 fails to tell you is that the Privus decision was decided in
17 British Columbia. The court that is presiding over the Grace
18 Canada proceeding is in Ontario. It's no different, Your
19 Honor, than if a court in California made a decision and
20 somebody came in and told you, Your Honor, well, they've
21 already decided it in the United States, Your Honor, so you
22 should know what that law is. It's apples to oranges. We
23 have a court in British Columbia that's applied the law in
24 British Columbia and in Grace Canada we have a court in
25 Ontario that we need to apply Ontario law. So we're starting

1 on different levels to begin with. I want to go through a
2 couple of facts that have been skipped over because I think
3 it's important and it goes to the questions you've asked
4 about how this process works. As Mr. Bernick said, Grace
5 Canada is the only debtor in the Canadian proceeding and I'm
6 probably using that debtor term improperly but under the CCAA
7 it does define them as a debtor. It is not a debtor in this
8 proceeding and none of the U.S. debtors have subjected
9 themselves to the jurisdiction of Canada in the Grace Canada
10 CCAA proceeding. In early 2002, the debtors filed a motion
11 for a bar date in this Court that included U.S. and Canadian
12 claims, and you know, Your Honor, we were here in front of
13 you for many months arguing over what that bar date would
14 look like and who it would extend to, and the debtor
15 specifically included all claims from Canadian buildings
16 against U.S. debtors. As a result of that bar date, claims
17 were filed by Canadian claimants against the U.S. debtors
18 thereby subjecting themselves to the jurisdiction of your
19 court. They did not subject themselves to the jurisdiction
20 of any Canadian proceeding. And I might note, Your Honor,
21 until the debtors filed their disclosure statement in
22 November of 2004, nobody on the property damage side of this
23 case was even aware that they had initiated a proceeding in
24 Canada in respect of Grace Canada. It wasn't part of the
25 notice program. They spent \$4 million plus dollars and

1 didn't even mention Grace Canada anywhere in that notice
2 program. So now we have claims that are from Canadian
3 buildings that have subjected themselves to jurisdiction in
4 this Court, and the debtors would have you gloss over the
5 fact that those claims arise from different provinces within
6 Canada. It's a big country. There are a lot of provinces. I
7 believe there are eight different provinces currently that
8 claims are pending against the U.S. debtors, primarily Grace
9 Con. They're ignoring all of that. Just send everything to
10 Grace Canada, to what we would consider a state court in
11 Ontario. This is not a federal court. It's a state court
12 that is presiding over Grace Canada. They want that court to
13 adjudicate claims across the country of which those claimants
14 have not subjected themselves to the jurisdiction of an
15 Ontario Superior Court. No different than if a claimant
16 living in Texas files a claim here. You can't send them to
17 California, Florida, pick another jurisdiction. They have
18 their own territorial grounds and nowhere in the debtor's
19 brief do they address the fact that just because a claimant
20 is residing somewhere in Canada, whether or not the Ontario
21 Superior Court has jurisdiction over that particular claim
22 that they haven't subjected themselves to that jurisdiction.
23 You asked two straightforward questions, and I think we
24 answered them in the brief that unequivocally the answer to
25 both of those are, no. You do not - The Canadian court does

1 not have jurisdiction over the claims of Canadian claimants
2 filed against U.S. debtors, and you don't have the authority
3 to send those claims up to that court for adjudication. Now,
4 Mr. Bernick has modified that today. Showed us an order that
5 we've seen for the first time that says he's not asking for
6 adjudication. He's asking for essentially an advisory
7 opinion for you to come back down here and asked for you to
8 either approve or disapprove of that opinion, and I think he
9 was careful to say that the reason he's not asking for a
10 ruling is that would be abstention. If he was asking for a
11 final ruling in Canada he would be asking you to abstain, and
12 it's clear you have no authority to abstain because there is
13 no proceeding pending in another jurisdiction in respect of
14 Grace Con, the debtor against whom the claims were filed.
15 Their reference to B&W, Your Honor, is interesting because
16 that was a decision entered by Judge Farley, who by the way
17 is no longer sitting on the bench and would not be the judge
18 who would be presiding over these. He left the bench about
19 three months ago, went into private practice. A new judge
20 who has absolutely no involvement in Grace Canada with no
21 history in the Grace Canada proceeding that's been pending
22 for five years would now be the judge who's asked to hear
23 this. So that when we were here the last time Mr. Bernick
24 called this kind of a rent-a-judge. Mr. Bernick mocked that,
25 but that's really what we're looking at here, Judge. This is

1 somebody who has no experience in the Grace Canada
2 proceeding, no experience in the Privus decision, which was
3 in a different province, and Mr. Bernick says, Just ship it
4 up there because it's a lot easier. It's a lot more
5 convenient. Your Honor, convenience doesn't carry the day
6 here. There's no basis to sending the claims up there, and as
7 it relates to the B&W Canada claims, in B&W, and we were not
8 involved in that case, Your Honor, but I have relied upon
9 others who were involved to find out information and upon our
10 own research, the B&W Canada proceeding that Justice Farley
11 extended to B&W Canada only was to extend the third-party
12 injunction that the Bankruptcy Court in New Orleans entered
13 in respect of the B&W U.S. debtors to apply to the B&W
14 Canadian debtor. It was one single debtor, same as what we
15 have here. In the beginning of this case, that Judge entered
16 the same injunction against Grace Canada, extended that
17 proceeding. Through all the research that Kirkland & Ellis
18 can come up with, all the research that our firm can come up
19 with, nobody has pointed to one case where a Canadian court
20 has adjudicated the claims against a U.S. debtor by Canadian
21 claimants, not one. All they did was extend the third-party
22 injunction. I must say, in an ex parte proceeding no less.
23 That decision, by the way, by Justice Farley has been heavily
24 criticized by every academic involved in those types of
25 proceedings in Canada, including the draftsman of the CCAA

1 who said that he's just gone way too far. One additional
2 point, Your Honor, Mr. Bernick referred to 18.6 sub (4) of
3 the CCAA, and where he referred to, on the application of a
4 foreign representative or any other interested person that
5 can seek ancillary relief from that court, the only other
6 interested person in that section does not refer to the
7 debtor. He's saying it's referring to the debtor Grace
8 Canada asking for that relief. Any other interested person
9 would be somebody wholly unrelated to that proceeding. He's
10 asking for Grace Canada to have that relief as an other
11 interested person to bring their claims against the U.S.
12 debtors up to Canada.

13 THE COURT: Well, I'm still confused, and I
14 apologize. I guess I'm missing something that is just not
15 getting through my thick skull, but I am missing the
16 connection between the Grace Canada case and the Grace U.S.
17 case and the fact that some entities who are Canadian
18 entities have filed claims against the Grace U.S. case and
19 what that has to do with the Grace Canada case?

20 MR. SAKALO: It has nothing to do with it. That's
21 why you're having confusion. I'm having the same confusion.
22 I think others are as well. It has nothing to do with the
23 claims. It just happens to be by Canadian claimants. They
24 are against U.S. debtors. They filed - Grace Canada, for the
25 protection as the disclosure statement lays out because it

1 was recently named before the bankruptcy in a number of
2 asbestos personal injury lawsuits. So they sought protection
3 in Grace - in Canada, for Grace Canada to prevent claims for
4 personal injury being made against Grace Canada. That's why
5 at the beginning of the Grace Canada proceeding, they sought
6 the extension of a third-party injunction the same one that
7 you or Judge Farnan had entered back in 2001, it was extended
8 to Grace Canada. That's why that case was implemented. Now,
9 because you made a comment early on in tune to what the
10 debtors had said in their disclosure statement, they would
11 like to ship the claims up to Canada under their plan, you
12 said, Well, if they can be tried in Canada. They've gone on
13 to that and have tried to expand the jurisdiction that just
14 doesn't exist. There is absolutely no relationship other
15 than at some level there are affiliated entities that maybe
16 filed the same tax returns.

17 THE COURT: Okay, so the Grace Canada cases were
18 essentially filed to get a personal injury injunction -

19 MR. SAKELO: It was an extension of the third-party
20 injunction, Your Honor. It's black and white in their
21 disclosure statement as to why they filed that case.

22 THE COURT: For Canadian Grace entities.

23 MR. SAKELO: Correct. For individuals - To protect
24 Grace Canada against individuals in Canada filing personal
25 injury claims against Grace Canada. No relationship to Grace

1 Con. The entity by the way, Your Honor, as we attached to
2 Exhibit A to our supplemental brief, was formed in 1998.

3 THE COURT: Yeah.

4 MR. SAKELO: So, if that's the case, Your Honor, and
5 they're saying that these are new claims that they're trying
6 to protect Grace Canada against, property damage claims, it
7 doesn't add up.

8 THE COURT: Okay, but, I'm glad you're saying that
9 you've got the same confusion that I have. Maybe that's the
10 answer to the question, but, just because the Grace Canada
11 case may not be the appropriate vehicle for asking a Canadian
12 court to assume ancillary or supplemental or ancillary
13 jurisdiction to assist in the Grace U.S. cases doesn't mean
14 that that process can't be undertaken.

15 MR. SAKELO: Your Honor, this isn't the case where a
16 claimant filed a claim against the debtor and is asking for
17 relief from the stay to go back and prosecute its claim.

18 THE COURT: Yeah.

19 MR. SAKELO: This is a debtor who came to Delaware
20 and asked for a bar date for all claims, from U.S. claimants
21 and Canadian claimants, and said, If you have a claim, you
22 have to come to Delaware and file the claim. Now the debtor
23 is essentially asking to leave the jurisdiction of this Court
24 and go somewhere else to have it heard, to a court that has
25 no jurisdiction to begin with over those claims. Grace Con

1 did not file a proceeding in Canada, just Grace Canada.

2 THE COURT: Well, I understand that Grace Con is a
3 U.S. debtor, but I think this Canadian statute seems to be
4 broad enough that Grace Con or claimants in Grace Con, some
5 interested party in the Grace Con case could go to the
6 Canadian Court and ask that Court to assume some form of
7 ancillary jurisdiction to assist in whatever the United
8 States court needed help with, and I'm not sure that that
9 means that claims adjudication can't be part of it.

10 MR. SAKALO: Again, they're not asking for
11 adjudication. They're asking for advisory opinions to come
12 back down here and then have you either agree with it or
13 disagree with it, and the reason they're not asking for
14 adjudication, again, is because that would be abstention, and
15 there are no grounds for you to abstain to because there is
16 no other pending proceeding. They go through this rigamarole
17 citing to Maxwell, citing to Regis Business Systems. Those
18 would apply if they had submitted themselves to the
19 jurisdiction of the Canadian proceeding, perhaps, but they
20 haven't gone that far. We don't know why they haven't. They
21 haven't told us why they haven't. They haven't told you why
22 they haven't, but they have not done that so they can't avail
23 themselves of the jurisdiction of that court, and in
24 addition, as I said at the beginning, they've skipped over
25 whether that court has jurisdiction over those particular

1 claimants. Just because they're Canadian, doesn't mean we
2 can go to Ontario because it was a Grace Canada proceeding.
3 Claimants are in Saskatchewan, Alberta, British Columbia.
4 They're in many different provinces, Your Honor.

5 THE COURT: Okay.

6 MR. SAKELO: Thank you.

7 THE COURT: Mr. Bernick, before you start, I see Mr.
8 Speights here. I think I'd like to hear from Mr. Speights.
9 I don't know that he's filed anything but with respect to his
10 position on behalf of his clients.

11 MR. SPEIGHTS: Thank you, Your Honor. Dan Speights
12 representing S&R claimants. I did file a joinder on the
13 initial pleadings and was here at the last hearing -

14 THE COURT: Yes.

15 MR. SPEIGHTS: - when this matter came up and was
16 prepared to address the Court on the question of should you
17 do this, and Your Honor asked the question in effect can I do
18 this - jurisdictional question, and on that question and I
19 understood you wanted to consider that question first, can
20 you do it. I have a whole lot to say on whether you should
21 do it on behalf of my clients, I have arguments to make that
22 you should not do it, but I would defer to counsel for the PD
23 Committee on the process question, the jurisdictional
24 question on whether you could do it or not.

25 THE COURT: All right.

1 MR. SPEIGHTS: Thank you, Your Honor.

2 THE COURT: Thank you. Mr. Bernick, I'm sorry, I
3 think there are other people who may still - Do you want to
4 be heard before Mr. Bernick? Okay.

5 MR. HOGAN: If I could, please, Your Honor. Good
6 afternoon, Your Honor. Daniel Hogan on behalf of the
7 Canadian ZAI claimants. I apologize, Your Honor. I
8 understand that you're probably not all that thrilled to hear
9 from me at this juncture, however, the issues that you're
10 discussing, obviously, have great impact on how the process
11 is going to proceed as it relates to these Canadian Zonalite
12 Claimants. I've only recently been retained by the Canadian
13 Zonalite attic insulation parties in Canada, and as you are
14 well aware, and I assure Your Honor, they were not party to
15 the science trial that has already occurred, nor do I
16 believe, after reviewing the docket, were they contemplated
17 by the science trial that you undertook back in I believe
18 2004. The reason I'm here today -

19 THE COURT: For which I am working my way through a
20 very technical opinion for about the fourth time to make sure
21 I understand it, so, if they're not part of it, then when are
22 they going to get to be part of it?

23 MR. HOGAN: Well, yes, Your Honor, and really the
24 point of it is, is that there needs to be a Canadian process,
25 a claims process for the Canadian Zonalite claimants, and

1 heretofore, one hasn't been contemplated, I don't believe, by
2 the debtors. I haven't seen anything evidencing the fact
3 that they have to integrate that into the process. The point
4 being that if the debtors proceed with the U.S. entities to
5 wrap up all of the issues relative to this case, which are
6 huge, but the Canadian Zonalite claims are still out there
7 and haven't been adjudicated. The claims process hasn't been
8 put in place. Well, that's going to bring everything on the
9 state side to a screeching halt until those issues - or at
10 least contemplated and resolved at least in terms of putting
11 some sort of framework in place, and to heretofore, we
12 haven't seen anything relative to that. The other issue, of
13 course, is the whole issue of the binding nature of any
14 determination, and obviously, the Canadian claimants, at
15 least as it relates to the Zonalite claimants, have great
16 concern about how such a process would be implemented. And
17 so, I apologize. I don't mean to muddy your waters, Your
18 Honor, anymore than they already are, but there's a 800 pound
19 gorilla standing over in the corner over here named Canadian
20 Zonalite Claimants and if what the debtor's arguing is in
21 fact going to happen with regard to the PD claimants, well I
22 think now is the time for us to stand up and say, We need to
23 be dealt with too, and we need to know the process that's
24 going to be implemented to deal with the Canadian Zonalite
25 claimants.

1 THE COURT: Well, give me all of the bad news. How
2 many of them are there?

3 MR. HOGAN: Your Honor, I believe it's in excess of
4 20,000 claimants.

5 THE COURT: Oh, that's just a drop in the bucket,
6 Mr. Hogan.

7 MR. BERNICK: There are no actual claims.

8 MR. HOGAN: Well, there hasn't been a bar date yet.

9 MR. BERNICK: There hasn't been a bar - We don't
10 know if there are any.

11 MR. HOGAN: I'm here to say there are, Your Honor,
12 and I'm standing up to be heard.

13 THE COURT: Okay.

14 MR. HOGAN: I believe the Crown may want to have
15 something to say relative to this issue as well. Thank you,
16 Your Honor.

17 THE COURT: Okay. Mr. Monaco?

18 MR. MONACO: Good afternoon, again, Your Honor.
19 Thank you for letting me be heard today on this matter
20 because, again, as Mr. Hogan said, we're not trying to muddy
21 the water, but we do need to take this into consideration
22 because whatever Your Honor decides today with respect to
23 this issue is going to affect the Canadian ZA claimants as
24 well as the Crown. Just to give Your Honor some brief
25 background on this matter. We have contribution

1 identification claims arising from ten separate class actions
2 which were filed against the U.S. debtors and Grace Canada in
3 Canada asserting claims against the Crown. These are similar
4 to the ones Your Honor has seen against the State of Montana,
5 basically a failure to warn type of theory. So, we deny any
6 liability, but to the extent there is anything to be found,
7 it is clearly derivative of Grace's. And, just to give Your
8 Honor some background about what's going on in the Canadian
9 insolvency proceeding, and I see Mr. Tay is here who
10 represents Grace Canada, he can certainly correct me if I'm
11 wrong, but Justice Farley issued an injunction which I
12 believe also covered certain PD claimants involving these
13 class actions in September of '05. This injunction issue is
14 similar to the one that the debtor asked in connection with
15 the Libby claimants. The other developments Your Honor
16 should be aware of in the Canadian solvency proceeding, the
17 court there has a designated representative for these ZAA
18 claimants, and also the Canadian Department of Health, which
19 is the equivalent of the EPA here, has issued a few reports
20 with respect to the ZAI problem in Canada. There's one that
21 deals with the estimation of a number of homes and also there
22 is also a report on the expert reports that were submitted in
23 connection with the science trial here. And it's also, my
24 understanding, that Grace was asked - invited to comment on
25 these reports but has not done so. Your Honor, we have in

1 the past attempted to initiate a dialogue with Grace to try
2 to come to some kind of understanding and agreement with
3 respect to the handling of these claims, including the
4 Crown's claims as well as the underlying ZAI claims. We've
5 been told that it's either premature or there have been
6 circumstances in connection with -

7 MR. BERNICK: Your Honor, at this point, I would
8 object to counsel characterizing the content of discussions
9 that I know I personally was involved in that were part of
10 the mediation process. If he wants to get into them, I
11 suppose I might be agreeable to that, but then Your Honor's
12 going to hear all about exactly what Grace told these with
13 respect to their claims, and I don't think that that's what
14 we're here for today.

15 MR. MONACO: That's not what I was going to say -

16 THE COURT: Okay.

17 MR. MONACO: - to Your Honor. I was just simply -
18 This is outside of mediation. We have tried to engage
19 dialogue for whatever reason. I understand debtor's
20 frustration. There's a lot of issues floating around in this
21 case, and maybe this is one on their radar screen that's not,
22 you know, at the top of the list, but nevertheless, they do
23 need to address these issues. I'm actually, despite Mr.
24 Bernick's sense or objection, I'm here actually to support
25 their request to have a Canadian process because right now

1 there is no process, and I think we need to have something
2 that will encompass Canadian experts, Canadian evidence,
3 Canadian law, and right now there isn't anything, and I would
4 seek a commitment from the debtor to work with the Canadian
5 ZA claimants and the Crown to come up with something that the
6 CCAA court would be able to implement so that we can get this
7 underway. The problem is we are behind in terms of the curve
8 with respect to getting these claims processed, and again, we
9 do not have to have a timetable, but it can run parallel to
10 what's going on in the Court here.

11 THE COURT: But the circumstance, the underlying
12 circumstance of the claims is the same, that is that the ZAI
13 claims - Well, let me break them down. The ZAI Canadian
14 claims are claims filed against the U.S. debtors.

15 MR. MONACO: And Grace Canada.

16 THE COURT: And Grace Canada debtors.

17 MR. MONACO: Yes, Your Honor.

18 THE COURT: And the indemnity claims are also filed
19 against Grace Canada but not the U.S. debtors.

20 MR. MONACO: Your Honor, we did file contribution
21 indemnification and proofs of claim against U.S. debtors
22 because the claims were joint against both the U.S. debtors
23 and Grace Canada.

24 THE COURT: Okay, so the ZAI claims and the
25 indemnity claims are against both the U.S. and the Canadian

1 debtors.

2 MR. MONACO: That is my understanding, Your Honor.

3 THE COURT: But the personal injury S&R claims are
4 only filed against the U.S. debtors.

5 MR. SAKELO: Those are property damage claims.

6 THE COURT: Oh, the Speights claims, I'm sorry.
7 They're only filed against -

8 MR. SAKELO: Speights & Runyan. Traditional
9 property damages claims only against U.S. Grace debtors.

10 THE COURT: I apologize. I knew they were property.
11 If I said personal injury, I'm sorry.

12 MR. MONACO: Right, and, Your Honor, and the point
13 being that, you know, we understand there's some differences
14 but what Your Honor decides today could influence how this is
15 handled going forward. We do believe that there should be a
16 Canadian process. Now, whether it's binding or not, that's
17 something I think the debtor needs to have input from the ZAI
18 claimants as well as the Crown and the Canadian court.
19 Again, it's the detail, but a very, very important one that
20 needs to be discussed, and, Your Honor, I would just sum up,
21 I really don't have much more to say. I did want to bring
22 this to the Court's attention along with Mr. Hogan's clients
23 that this needs to be addressed, and we would like to get
24 some kind of process underway, get the discussions going, and
25 with that, I'll wrap up. Your Honor, the only other thing I

1 would add is I filed an objection to exclusivity, which
2 essentially, based on what I've just stated to the Court, I
3 would not want to burden the record any further on September
4 11th, or have my client incur the costs of having to fly out
5 to Pittsburgh, so I would request I could just participate by
6 telephone, because I would have nothing much more to add.

7 THE COURT: You can participate by phone.

8 MR. MONACO: Okay, thank you, Your Honor.

9 THE COURT: Anyone else before Mr. Bernick? Okay.

10 MR. BERNICK: Maybe we'll find out something new
11 from Canada. I'd like us to focus for half a moment on this
12 and then Mr. Tay who has been sitting back there busting at
13 the gills, will, I'm sure, have something further to offer.
14 I don't see any - This will do. The whole issue here, and
15 Your Honor has asked a couple of questions that relate to
16 this, there's first of all the question of what is the power
17 or jurisdiction of the Canadian proceeding? What is it? And
18 thus far, again, I cited two sources of information to answer
19 that question. One is the statute and two are the decisions,
20 and Your Honor has seen no other decision, has seen no other
21 interpretation of the statute. The only thing that we've
22 heard is kind of a ride-by shooting of Justice Farley because
23 (a) he's no longer on the bench, and (b) academics have been
24 very critical. I understand that there is a professor who
25 has had some commentary on Justice Farley but thus far his

1 decisions have been cited and approved and followed by the
2 Canadian court. So that's what we're talking about. We're
3 not talking about whether Justice Farley still practices law
4 or not. We have a U.S. proceeding here, and the question is,
5 what then is the jurisdictional ambit of the CCAA proceeding?
6 And as we've indicated, it is an ancillary proceeding. The
7 Canadian legislature granted the power to this Court to
8 conduct the proceeding that is ancillary to a foreign
9 proceeding, and that's the language of the statute. It is a
10 foreign proceeding. Now, in the Babcock & Wilcox case, in
11 the decisions that we've cited to the Court in the briefs,
12 the Court specifically found that the Babcock & Wilcox U.S.
13 proceeding was a foreign proceeding within the meaning of the
14 Canadian statute and thus that there was power under the CCAA
15 to enter various orders at the request of Babcock & Wilcox of
16 Canada, which was not a debtor. So there was no parallel
17 bankruptcy proceeding. There was no bankruptcy proceeding in
18 which Babcock & Wilcox came over to Canada. There was a
19 proceeding that was initiated by B&W of Canada, not a debtor,
20 but a petitioning party saying, Commence this ancillary
21 proceeding, ancillary to a foreign proceeding. So it's kind
22 of like In Re the Babcock & Wilcox debtor's case in the
23 United States. Here is what we're going to do. And Justice
24 Farley said, Okay, B&W Canada is here making a request.
25 They're solvent. That doesn't make a difference. They can

1 just be an interested party under the foreign statute. There
2 is a U.S. bankruptcy proceeding. I find that the U.S.
3 bankruptcy proceeding is a foreign proceeding within the
4 meaning of the CCAA and as a consequence the CCAA can proceed
5 at the request of B&W and grant relief. Now, they say, Well,
6 you haven't told a case where they decided the merits of a
7 claim, but, but, but - Sure. We have a whole - We've got
8 about a thousand different things that could take place in
9 Canada, and we don't have a case where exactly the same thing
10 happened as we have presented here, but all of those cases
11 that we have are cases in which rights of claimants are being
12 affected. For example, the rights of claimants against
13 Babcock & Wilcox in the United States were being affected
14 because the channeling injunction of the U.S. proceeding was
15 extended to include the plaintiffs in the Canadian cases of
16 Babcock & Wilcox. So, it's not deciding the merits of in a
17 narrow sense, but it's certainly affecting and limiting and
18 interpreting their rights. Same thing has now happened in
19 the Grace case. In the Grace case, the Grace case was
20 initiated by Canadian Grace. Not a debtor. Not insolvent,
21 but an interested party, and it was initiated and a finding
22 was made that this case here before Your Honor, is a foreign
23 proceeding with respect to the CCAA, therefore, the Canadian
24 court has power to act in connection with the foreign
25 proceeding at the request of Grace Canada. So the case that

1 exists, the proceeding that's been filed and exists in Canada
2 today is an ongoing proceeding where the petitioner was Grace
3 Canada, but this is not like a U.S. bankruptcy case where the
4 debtor's estate defines the scope of the case, this is an
5 ancillary case where it is there to assist, in a sense, the
6 race or the proceeding in the U.S. So the key finding is
7 that this is the foreign proceeding. This then becomes the
8 ancillary proceeding. It can be initiated by any interested
9 party, and it can act. So all that we're saying is, Your
10 Honor, we believe it's appropriate here in the U.S. to have
11 the CCAA proceeding act with respect to this issue. It's
12 within the power of the CCAA court. It's within the power of
13 this Court based on comity principles to allow this Court to
14 proceed in whatever fashion suits both the Canadian statutory
15 purposes and your purposes. Now, they say a couple of
16 different things, and I want to - let's see, here are my
17 notes. They say, Gee, we can't avail ourselves of this
18 proceeding, suggesting that somehow we have got to be there.
19 That's just flat wrong. The statute says any interested
20 party. We are here. This proceeding is designed to serve
21 your process. It doesn't have to be at our request. The
22 statute says it can be any interested parties, and we see
23 that Grace, that B&W of Canada went through exactly the same
24 kind of process, and we quoted others to you as well. They
25 say, There's no jurisdiction in Canada over Mr. Speights'

1 claimants who are Canadian. That's not the issue. The issue
2 is Your Honor's jurisdiction. Your Honor has jurisdiction
3 because those folks came into the U.S. court and submitted to
4 the jurisdiction of the U.S. Court, and if Your Honor then
5 says, I want their rights adjudicated to the point of telling
6 me what Canadian law says by the Canadian proceeding, this
7 court in Canada doesn't have to have independent personal
8 jurisdiction over Mr. Speights' clients at all. That's a -
9 completely misses the point. The point is that they
10 submitted to this proceeding, it is Your Honor's proceeding
11 that creates the touchstone for whether the CCAA has the
12 power, the court has the power to proceed.

13 THE COURT: I truly can't send claims to a court
14 that doesn't have jurisdiction over those claims.

15 MR. BERNICK: No, the court does have jurisdiction
16 in the sense that they have ancillary jurisdiction - They
17 have ancillary jurisdiction to assist Your Honor in deciding
18 what to do with those claims. You don't - Your Honor, again,
19 Mr. Becker suggested I use this analogy and maybe he's right.
20 It's the same kind of thing as if the Court of Appeals for
21 the Third Circuit refers an issue of the interpretation of
22 Pennsylvania law to the Pennsylvania Supreme Court on
23 certification.

24 THE COURT: Well - that's what I was trying to get
25 to earlier in my thought process as to whether it is the same

1 thing or not, but the difference is that when the
2 Pennsylvania Supreme Court then gives the Third Circuit its
3 view as to what Pennsylvania law is, that's what the Circuit
4 then treats Pennsylvania law to be.

5 MR. BERNICK: That's correct. However, it is then
6 up to the Circuit, depending upon the question that was
7 certified to decide what impact is going to be given to that
8 in the case. We're not saying that Your Honor should
9 reinterpret Canadian law. Once the Court in Canada
10 interprets Canadian law it seems to us that that would be
11 pretty much dispositive of what the Canadian law requires.
12 But if Your Honor believes that there's something about the
13 process in Canada that was a failed process or some other
14 aspect of their rights that have been impaired, Your Honor
15 would still have the ability to address those kinds of
16 issues. You wouldn't have to decide Canadian law over again
17 because Canadian law has already been decided. But -

18 THE COURT: That's where I - To the extent that it
19 were done on some papers, you know, a summary judgment
20 process, I can follow your logic, but if it gets to the point
21 that you get to the next step, which you said in the event
22 that there was a failure of the summary process would involve
23 a trial, I don't see how I retry cases.

24 MR. BERNICK: No, no, it would be a trial - Well, I
25 did say that in the sense that - Let's assume, for example,

1 that on summary judgment there is an issue of fact that
2 relates to whether the statute of limitations was triggered
3 or not or something like that. We're not going in the same
4 fashion that we went before in connection with the U.S.
5 claims. We're not going to sit there and litigate the
6 Canadian claims one by one. I didn't want to be in a
7 position such that the Court was powerless to conduct an
8 evidentiary hearing in order to decide a fact. There might
9 be facts that are of key importance in terms of applying the
10 law, and I think that if the Canadian Court were confined to
11 summary judgment, although we really think summary judgment
12 is in fact going to be where we're going. We are clearly
13 going to file for summary judgment based upon Privus. We're
14 clearly going to file for summary judgment based upon the
15 legal issues articulated in Privus. We're going to file for
16 summary judgment based upon the statute in repose in Canada,
17 which is a very distinctive statute of repose. So we think
18 that that's going to weed out the claims very effectively,
19 but we don't know, it's hard to foresee, that there might be
20 some factual issue that arises in that process and if so, we
21 don't want to leave the Court in Canada hamstrung to at least
22 make a record of what the facts are that then are critical
23 from a legal point of view. If Your Honor believes that that
24 wasn't appropriate or believes that the record somehow is an
25 improper record, Your Honor would retain the jurisdiction to

1 say so, but to give the Canadian Court proper running room to
2 decide the application of Canadian law we didn't want to just
3 limit it to summary judgment, and that's why we extended it
4 beyond that. I don't really - Again, you take the appellate
5 situation. The appellate court can frame a very narrow issue
6 for the state court to decide and then reserve to itself the
7 jurisdiction to resolve all other matters, and I think that
8 that same kind of flexibility should be here. I just want to
9 add a couple more things in response to some statements that
10 were made by counsel and then I'm going to give Mr. Tay an
11 opportunity to stand up here for a moment if there's anything
12 further that needs to be covered. First, with respect to the
13 idea that we omitted to tell Your Honor that Privus was in
14 British Columbia. Yeah, it was in British Columbia. That
15 doesn't mean that the other provinces would have different
16 law. It was British Columbia. Now what does that mean?
17 Does that mean that we have to then initiate CCAA proceedings
18 in all of the different provinces so we can get provincial
19 judges from each province to articulate whether there are
20 nuances or differences between the provinces? I don't think
21 so. The CCAA proceeding can address whether there are
22 nuances. If they want to say - if Mr. Speights wants to say
23 up there, Privus is really confined to British Columbia law,
24 that's something that the Court in Ontario has the perfect
25 competence to address and take a look at variations. The

1 alternative is that - we then say to Your Honor, we want you
2 to decide whether British Columbia law, which was Privus
3 really should be binding with respect to Ontario claimants or
4 Quebec claimants or Saskatchewan claimant. Is that what
5 they're really saying? Is it Your Honor can be better able
6 to decide whether the variations in provincial law are
7 material than a Court sitting in Ontario? I don't really
8 think so. He said, Well, this is not a federal court
9 proceeding, doesn't understand the jurisdictional setup in
10 Canada. The state courts do have the power to apply and
11 execute and implement grants of jurisdiction and authority
12 under the federal statutes in Canada. So it is a state court
13 essentially acting as a federally empowered court. That was
14 a misstatement. And then Your Honor was told, Well, they
15 don't really have any prior experience in this, and that
16 again, is a real irony because certainly the Canadian courts
17 will have much greater experience with respect to the
18 application of Canadian law than anybody we here have in the
19 United States. Last point is the ZAI. We always welcome
20 support. It was hard for me to figure out what it was
21 actually support for. Let me say this with respect to ZAI.
22 First, we had an all in very, very expensive, very extended
23 ZAI proceeding here in the United States focused on the
24 science of ZAI. Remember, we went through the process of
25 crafting the question. The ZAI science trial has taken

1 place, and we appreciate that Your Honor is going back over
2 the opinion, but that science trial is not a question of is
3 the science different in Canada than it is in the United
4 States? That's a science trial. Counsel was specially
5 picked and paid to represent the interests of all ZAI
6 claimants with respect to that science issue. Now, it may be
7 that after the science trial is done there are legal -
8 Canadian legal issues that have to be resolved with respect
9 to Canadian ZAI claimants. I can certainly entertain that
10 possibility and we're certainly open, if we're proceeding in
11 Canada, to talk about getting Canadian law interpreted with
12 respect to Canadian ZAI claims. But, we do have a science
13 trial. That science trial was designed to be all in, and
14 therefore, I don't know how the position that was just
15 articulated really is very different from where we're already
16 at with ZAI, which is, let's see what happens with the
17 science trial, and then after that we can then determine what
18 happens with respect to other issues concerning ZAI if there
19 are any other issues with respect to ZAI. And having now
20 said that, I'd like to give Mr. Tay just a moment, if he
21 could, to stand up and tell me what I - tell the Court what
22 I've gotten wrong.

23 MR. TAY: Good afternoon, Your Honor.

24 THE COURT: Good afternoon.

25 MR. TAY: Derrick Tay. I'm Canadian counsel for

1 Grace. I also happen to be or I was Canadian counsel in the
2 Babcock & Wilcox case as well, and so I'd like to sort of
3 help Your Honor to understand this issue because I can see
4 it's troubling you, and I think the first point of confusion
5 is thinking of the filing in Canada as the Grace Canada
6 filing because really, 18.6 doesn't even come into play at
7 all unless you have a foreign proceeding. That's what it's
8 all about. So, someone has to come to a court in Canada and
9 say, I have a foreign proceeding going on somewhere outside
10 of Canada, and I need help with that foreign proceeding. Who
11 that someone is, is almost irrelevant. The statute allows
12 any interested party to do it. In this case it happened to
13 be Grace Canada, Inc. Now, to put it - to flip it over, I'm
14 involved, for example, in a Chapter 15 case right now where
15 the monitor in a Canadian case, which is the principal
16 jurisdiction, goes to Judge Raygoff (phonetical), in New York
17 and says, I need help. We need an ancillary proceeding under
18 Chapter 15 in the U.S. in respect of this Canadian case. No
19 one thinks of it as the monitor's filing. It's exactly the
20 same. The filing is in respect of the U.S. cases not in
21 respect of Grace Canada itself. It's in respect of the U.S.
22 cases, the foreign proceeding. It was the case in B&W
23 Canada. It is the case in Grace. In B&W Canada, for
24 example, there was no Canadian issue at all. There were no,
25 you know, at the end of the day, every order that the

1 Canadian court implemented was an order made in respect of
2 the U.S. case to give effect to it in Canada because
3 notwithstanding the jurisdiction that the Court takes in the
4 U.S., that order, unless recognized by a Canadian court will
5 not have effect in Canada. And so, the purpose of the
6 Canadian court's involvement was to do exactly that, to help
7 and assist and to give effect to those orders as they're made
8 by the U.S. Court and to give effect to them in Canada.
9 Happened in B&W, happened in Grace. Solvent company which
10 caused a little bit of an issue because generally the CCA's
11 an insolvency statute, but going under 18.6 sub (4) which
12 says, Any interested party can bring this motion, the court
13 in Canada found that that interested party doesn't have to be
14 insolvent because it's not a proceeding in respect to that
15 company. It's a proceeding in respect of a foreign
16 proceeding which this Court has decided - which the Canadian
17 court has decided to help.

18 THE COURT: So, the filing of Grace Canada in Canada
19 is not an insolvency proceeding.

20 MR. TAY: No, no. It happens to be under an
21 insolvency statute, which is why it was so unique. Babcock &
22 Wilcox was the first time it was done, and it became the
23 precedent and has been followed every since. So it's not an
24 insolvency filing. Babcock & Wilcox Canada was not
25 insolvent, neither was Grace Canada insolvent, but it brought

1 the proceeding under Section 18.6(4) as an interested party
2 saying to the Canadian court, please recognize the U.S.
3 proceeding as a foreign proceeding. And it is that finding
4 in each of the cases - the first thing that the court finds
5 is, Yes, I find the U.S. Chapter 11 case to be a foreign
6 proceeding, and from that point, it derives its authority.
7 From that point it then looks at 18.6 and says, now that I've
8 found a foreign proceeding, I now have the power to do
9 whatever is necessary to assist the foreign proceeding to
10 help to implement and all the rest of it that Mr. Bernick's
11 read to you. So that's how that particular statute works.
12 It's like a Chapter 15 and the applicant is like a foreign
13 representative. The case is not in respect of that
14 applicant. It's in respect of the foreign proceeding.

15 THE COURT: All right, I understand that point, but
16 I'm still a little fuzzy on how the Canadian court can
17 exercise jurisdiction over United States claims.

18 MR. TAY: The court can do that because it is
19 replying to your seeking their assistance to do that. So,
20 you have jurisdiction over the U.S. claims, there's no
21 question about that. They were filed in the U.S. but you
22 look at it and you say, Well, the facts are Canadian, this
23 all happened in Canada, the claimants themselves are
24 Canadian. I have an ancillary proceeding in Canada. I have a
25 court that's better equipped to deal with these issues, so

1 I'm going to seek their assistance. So, really, they're
2 doing it at your request.

3 THE COURT: So the Canadian long-arm statute is
4 broad enough that it will exercise jurisdiction over claims
5 filed in a foreign proceeding, simply because the U.S. Court
6 that does have jurisdiction asks it to exercise -

7 MR. TAY: It's not a long-arm statute. It's a clear
8 - you know, it's a - Parliament has decided that this is a
9 good thing to do and the statute clearly says, clearly says,
10 that they can do - the court can do whatever it thinks is
11 appropriate to assist you, and -

12 THE COURT: How do we get one of those bills passed
13 in Congress in the United States.

14 MR. TAY: Well, that's why we get things done a lot
15 faster.

16 UNIDENTIFIED SPEAKER: This is why we have the
17 United States.

18 MR. BERNICK: That actually has been discussed in
19 the Rules Committee, because it gives them much more
20 flexibility to give relief without having a full-blown
21 Chapter 11 proceeding.

22 THE COURT: Okay.

23 MR. TAY: Can I help you with any other questions?

24 THE COURT: Probably, but at the moment, I'm sort of
25 overwhelmed, so I'm not sure what to ask. Thank you. If I

1 think of it, I'll get back to you.

2 MR. TAY: All right.

3 MR. SAKELO: Your Honor, I want to make this quick.
4 A couple of observations. Under Mr. Bernick's premise here,
5 he says, Any interested party or any interested person can
6 take advantage of that proceeding. Tomorrow, you're going to
7 have Federal-Mogul walk in here, Armstrong, every other
8 debtor and say, There's a Grace Canada proceeding that I wish
9 to avail myself of. Under his construct, they can do that.
10 That court there can take jurisdiction over any of your cases
11 because those are foreign proceedings. There has to be no
12 connection to the U.S. debtors under his construct. Your
13 Honor, it can't go that far?

14 THE COURT: Well, no, that - Mr. Bernick, I don't
15 think is arguing that, and if I understand Mr. Tay correctly
16 there has to be a foreign proceeding in the United States
17 that the Canadian court recognizes. The Canadian Grace
18 Canada case is not, I think, going to recognize the Federal-
19 Mogul case as somehow ancillary to the Grace Canada case.

20 MR. SAKELO: They keep harping on any other
21 interested person.

22 THE COURT: Yes, but, how does Federal-Mogul have an
23 interest in Grace Canada?

24 MR. SAKELO: No more so than the Grace debtors do,
25 Your Honor.

1 THE COURT: Well, the Grace -

2 MR. SAKELO: They're saying that Grace Canada has -
3 the Grace Canada proceeding has no relationship to this
4 proceeding. It's there solely to recognize this proceeding
5 as a foreign proceeding. That's it. They just told you
6 that. Mr. Tay just told you that.

7 THE COURT: But isn't there a corporate affiliation
8 between the Grace U.S. debtors and Grace Canada?

9 MR. SAKELO: Yes.

10 THE COURT: Okay.

11 MR. SAKELO: At some level there is.

12 THE COURT: Well, that makes all the difference, I
13 would think.

14 MR. BERNICK: Maybe I could save some time, Your
15 Honor. What we said was, Any interested person, that means
16 the only people that can make the request are interested
17 parties, and there are interests that Grace Canada has. But
18 that's only the first prong. You then go to, well, what is
19 the foreign proceeding with respect to which you then define
20 what the CCAA can do by way of ancillary activities? Here
21 the foreign proceeding is the Grace cases, not the Federal-
22 Mogul case, it's not the whatever case, so that becomes the
23 touchstone then for what can be taken up in the CCAA. We
24 never said there was no relationship at all. That's
25 completely false. The whole idea is, it is ancillary.

1 They're totally tied together. Your Honor becomes the
2 touchstone for what it is that the CCAA proceeding can take
3 up.

4 THE COURT: Okay.

5 MR. SAKELO: Your Honor, I submit that there - they
6 keep waffling back and forth whether it has to be a
7 connection, there isn't a connection. Grace Canada is there
8 for convenience -

9 THE COURT: Let me take care of that one. I think
10 there has to be a connection. So to the extent their
11 argument can somehow be interpreted otherwise I don't agree
12 with it, but -

13 MR. SAKELO: Your Honor, with respect to the issue
14 of whether you can assume jurisdiction over the claims here
15 because Canadian claimants filed claims in this Court and now
16 transferred them to another court that has jurisdiction, we
17 just keep following the bouncing ball. Remember, none of
18 those claimants had any notice whatsoever of the Grace Canada
19 proceeding. So now they've submitted themselves to the
20 jurisdiction of this Court pursuant to your bar date order.
21 They knew what they were doing by making that choice. Now -

22 THE COURT: But they wouldn't have claims against
23 the Grace Canada proceeding if it's not a bankruptcy
24 proceeding anyway.

25 MR. SAKELO: They may have had independent claims

1 against Grace Canada. Just because -

2 THE COURT: But it's not an - but that's where I
3 have been - somehow I've mislead myself. I thought that the
4 Grace Canada case was an insolvency case for Grace Canada.
5 That's apparently not the circumstance. It's been filed only
6 as an ancillary. We can call it a miscellaneous case. Like
7 an adversary proceeding before Chapter 15 took place here,
8 that's what it would have been here. It would have had the
9 name of Grace Canada with an adversary number, and in that
10 case there would have been proceedings that went on with
11 respect to the main case as to which it was ancillary, but it
12 is not a bankruptcy proceeding of its own. So, if that's the
13 case and Grace Canada is not an insolvency proceeding in
14 Canada, then there are no claims that can be filed in that
15 specific case because it's not a bankruptcy case.

16 MR. SAKELO: Well -

17 THE COURT: There may be claims against that debtor
18 -

19 MR. SAKELO: That's correct, but let's not forget,
20 Your Honor, that they have sought injunctions in that
21 proceeding -

22 THE COURT: Yes.

23 MR. SAKELO: - to protect that debtor - As I said
24 at the beginning, I might be using the wrong word - that
25 debtor from having claims asserted against it. They have an

1 injunction against that. So it may not be an insolvency
2 proceeding as we think of it, but they have the benefit of
3 injunctions entered to prevent claims being filed against
4 that entity.

5 MR. BERNICK: And the basis - Correct. And the
6 whole basis for that was that the court in Canada made the
7 determination that that relief was appropriately ancillary to
8 serving the needs of the U.S. case, and there are
9 relationships between Grace Canada and Grace U.S., if there
10 were absolutely no relationship that relief would not have
11 been necessary, but the court made a finding that it was an
12 appropriate foreign - it was a foreign proceeding and that
13 relief was appropriate as being ancillary to the foreign
14 proceeding.

15 THE COURT: Well, just because there is an
16 injunction though does not mean that it's an insolvency case.

17 MR. SAKELO: That's correct, Your Honor, and I'm not
18 suggesting that it is an insolvency case.

19 THE COURT: Okay.

20 MR. SAKELO: It's also important to note that what
21 we've heard today is the Canadian court has only implemented
22 orders, and Mr. Bernick just repeated that, to protect
23 matters or to continue matters that are taking place here.
24 So, in essence what we're hearing is that court is there just
25 to benefit this proceeding. Judge, they're renting the court

1 again. It goes back to Mr. Baena's comments at the last
2 hearing. There's no tie to that court. They're asking for
3 you to lift the stay to allow the defendant to go back up
4 there and prosecute the objections. That's what they're
5 asking you to do, with no basis. That's an abstention, Your
6 Honor. There's no proceeding. They make reference in their
7 supplemental brief on Chapter 15 and how that's so important
8 and that we have to look at the legislative intent. Chapter
9 15 on its face, Your Honor, says it has to be the same debtor
10 in both proceedings. So if they're trying to indicate that
11 Congress here is telling you what to do by their new
12 legislation. It's not the same debtor, Your Honor. We
13 submit there's no basis for that court to assume jurisdiction
14 over the Canadian claims against U.S. debtors and that you
15 have no authority to transfer those claims to Canada.

16 THE COURT: Okay. Mr. Bernick, I would love to send
17 these claims to Canada and have either the advice or the
18 final rulings or the whatever it would take of the Canadian
19 court, but frankly, I think I'm going to be creating an
20 appellate issue in doing that which is going to further delay
21 the outcome of this case when the debtor is saying that you
22 don't really care much whether it's litigated here or there.

23 MR. BERNICK: We care very much otherwise we
24 wouldn't have done this in the sense that we really think
25 that it - given the very unique circumstances that are

1 present in Canada and the track record of they're being used
2 in other cases, it just seems like, you know, you've got an
3 opportunity to get a Canadian court to take a pass on this,
4 and it's totally not only legitimate, Canada wants to do it,
5 and they won't charge you rent. And so, why not? But, if
6 Your Honor - That's why I said a little while ago, if Your
7 Honor would feel more comfortable in taking these issues up,
8 we're happy to do it. We just - We want to get the process
9 done because we think that it's going to be pretty
10 straightforward.

11 THE COURT: It seems to me that I have the ability
12 to require the parties to retain an expert for the Court's
13 use, and if I need one, then I guess that's the way I can do
14 it in this case.

15 MR. BERNICK: That's fine.

16 THE COURT: So, if I need expert help, and I may,
17 then maybe the better rationale, rather than having yet -
18 because I believe this would be in the final order because
19 otherwise jurisdiction - I don't know what would happen in
20 jurisdiction, so, I think it would be creating an appellate
21 issue that would really further delay things.

22 MR. BERNICK: Then what we would do, Your Honor, and
23 maybe we'll get to it in connection with the property damage
24 CMO is I don't think it really would - We would simply create
25 a track in the CMO for Mr. Speights' Canadian claims and seek

1 to have them litigated, in fact, I think the language that we
2 already have in the proposed CMO would be very amenable to
3 this, and we'll get Mr. Tay involved and they can retain
4 Canadian counsel if they want, and we'll tee it up for Your
5 Honor. We're happy to do it. We just thought this would be,
6 you know, a better way to go, but that's fine.

7 THE COURT: Well, it may be a better way to go in
8 terms of the initial rulings, but I don't know in terms of
9 the delay that the debtor contends it doesn't want to have in
10 the case whether it would be. So, I think on balance, it
11 would probably be better simply to do it here and to figure
12 out a method by which I can get whatever expert help I need,
13 and if Justice Farley is no longer on the bench and is in
14 practice and he's out there and serving as expert and maybe
15 he's somebody -

16 MR. BERNICK: I'm not sure I want to subject Justice
17 Farley to all these scathing criticisms, but I'm sure that we
18 will have no problem whatsoever, Your Honor, I think in
19 finding people in Canada to weigh in on this given the effort
20 that was dedicated to the Privus case.

21 THE COURT: Okay.

22 MR. BERNICK: I know we've been going for awhile and
23 probably longer than anyone thought that we would on this
24 issue. Let me just preview what's coming up and Your Honor
25 then can decide whether you want to take a break or whatever

1 is most appropriate. The next area is we have the last of
2 the thirteenth omnibus issues with respect to Mr. Speights'
3 claims, and this relates to the question of whether a
4 purported grant of authority to Mr. Speights to present the
5 claim on behalf of the claimants after the fact satisfies the
6 rules. That would be next. Then we have the Anderson
7 Memorial matter where Your Honor has asked us to report on
8 the notice program. Your Honor will recall that you asked us
9 to do the notice program that was actually used with respect
10 to the property damage claims, and then the CMO is the last
11 real issue for property. On personal injury we then have the
12 bar date and the CMO on personal injury and then a status
13 report on the questionnaire. I don't think the personal
14 injury will go on as long as this property. It might be
15 better if we tried to maybe get through the - at least the
16 next item before we took a break. I think we can do that,
17 but obviously we stand at the Court's pleasure.

18 THE COURT: That's fine.

19 MR. BERNICK: Okay.

20 MR. BAENA: Your Honor, wouldn't it make more sense
21 since we've already alluded to it, to talk about the CMO now
22 before we go into claims.

23 MR. BERNICK: Well -

24 THE COURT: To talk about what, Mr. Baena?

25 MR. BAENA: The PDCMO.

1 MR. BERNICK: I'm happy to do that too.

2 THE COURT: That's fine.

3 MR. BERNICK: Yeah, I'm happy to do that.

4 MR. BAENA: Is that okay with Mr. Speights?

5 MR. SPEIGHTS: That's fine with me.

6 THE COURT: All right, so you want to talk about the
7 scheduling order with respect to the rest of the fifteenth
8 omnibus, which is number 6 or simply to go into the PDCMO
9 process altogether?

10 MR. BERNICK: It's the PDCMO process. The number -

11 THE COURT: Nine.

12 MR. BERNICK: Number 9, yeah, and I think that this
13 will be another interesting discussion.

14 THE COURT: Okay, before we get there, I want to
15 wrap up the prior discussion. You're going to get together
16 with folks and submit an order that will set up a process to
17 adjudicate the Canadian claims here?

18 MR. BERNICK: I'm going to work that into actually
19 the PDCMO discussion.

20 THE COURT: All right.

21 MR. BERNICK: And then, depending upon how Your
22 Honor reacts to it, that will at least make us more focused
23 in what we would then draft up by way of an order that is
24 specific to the Canadian claims.

25 THE COURT: So, I'll take an order from the debtor

1 then that denies the debtor's motion -

2 MR. BERNICK: That will be fine.

3 THE COURT: - with the understanding that the
4 process will be incorporated into the PDCMO.

5 MR. BERNICK: That's fine.

6 THE COURT: All right.

7 MR. BERNICK: Let me just - we had a long discussion
8 last time, as Your Honor will well recall, on the history of
9 what's happened in our efforts to get a litigation track
10 going with respect to the PD claims, and I'm not going to
11 revisit the details of that, but I'll create what I hope to
12 be an accurate hook to that and where we are today and where
13 we've gone in the last 30 days. I think it's probably fair
14 to say that most of the discussion that we had with respect
15 to PD claims last time focused on what is Phase II as it was
16 then known. I think there was an effort to change the label
17 at the end, but I don't know that that really is all that
18 germane. I think Your Honor came to the view that what you
19 always had anticipated would be done in the Phase II hearings
20 or the April hearings, I'll just refer to it that way, is
21 that there would be litigation over gateway objections that
22 pertained to the PD claims, and that those gateway objections
23 would in fact be lodged as to individual claims and what that
24 then gave rise to was the issue of notice, and I think that
25 that's where we ended up last time. In the course of that

1 discussion, we did point out the fact that the fifteenth
2 omnibus objections that have been lodged in September of 2005
3 provided detailed notice to each and every claimant about
4 each and every objection that was to be made with respect to
5 their claims, and further, the dates when those objections
6 would be heard. Remember, I displayed, Your Honor, the
7 tables that set out, you know, objections E-1, E-2, E-3 and
8 then the dates when they would be heard, and then with
9 respect to each claimant or each claim, we indicated which of
10 the objections - we believe that there was complete and
11 adequate notice and Your Honor said, I hear you but I want to
12 have a different notice anyway. So, we went ahead and Your
13 Honor actually focused on it in this language. This is at
14 page 170 from the last hearing. You said, I will make it
15 clear, I think, I think we need to give a different notice.
16 Mr. Speights is here. Mr. Dies is here. Counsel for
17 Prudential is here. I don't know, Mr. Speights, whether you
18 need additional time to supplement whatever you have
19 submitted. Gentlemen, the same question for you. If you
20 need some additional time to supplement because you're going
21 to participate on behalf of your clients in Phase II, I'd
22 like to work out a schedule to get it in. Meanwhile, the
23 other sixty-five other claimants - and you were there making
24 reference to claimants who were not represented by Mr.
25 Speights, Mr. Dies, or Prudential, are to get a different

1 notice, a new notice, I should say, that reminds them that if
2 they choose to participate in the process whatever rulings
3 come out will be binding and not re-litigated, et cetera, et
4 cetera. It is an estimation process. It is an allowance
5 process but it isn't an estimation process. And I then had
6 some further discussion and then Your Honor says, Well, I
7 think we'll give them a specific notice that says, you know,
8 this is your chance. Discovery is starting. Lay it all out
9 and if you do not participate in discovery and do not come to
10 the trial, then you may have your claim disallowed for all
11 purposes, et cetera. So, those were the directions that Your
12 Honor gave. Now, at that point I then say that I think this
13 is really a matter of scheduling at the end of the day.
14 Those were - that was my next statement because I thought
15 that that's really a question of scheduling at the end of the
16 day. We're talking about Phase II. So, we thought that what
17 would be appropriate was to essentially solicit the views of
18 Mr. Dies and Mr. Speights and Prudential on how much more
19 time they needed, and then further to provide a notice to
20 everybody else so that they could be brought up to speed. So
21 - and to stay within the scheduling parameters that Your
22 Honor set up. So that's what we did. We submitted a draft
23 along those lines, and that prompted Mr. Baena and his
24 constituency, albeit again the position was taken that the
25 claimants would have to speak for themselves through their

1 own counsel, but they came back with the position that says,
2 No, you haven't followed what Judge Fitzgerald said you
3 should do. What you should do is give notice to everybody
4 that they should come - they had the opportunity to come in
5 and basically express their views on whether there should be
6 a CMO, what the CMO should say, whether there should be a
7 hearing that dealt with this, that, or the other, that
8 essentially everybody else should have the opportunity to
9 come in, in the sense revisit everything that we've been
10 discussing in the last year. They should have their own
11 crack at it, and it wasn't simply a notice of the fact that
12 there was going to be a hearing in April and they'd better
13 get involved because it's going to be binding on them. So,
14 at this point, Your Honor, it was not a happy discussion and
15 we could argue about what the motives or strategic interests
16 might be for this approach. We could argue about whether
17 these people already had had notice. We could argue about a
18 whole bunch of different things, but Grace stepped back and
19 said, Look, it's not worth it to create another omnibus
20 hearing or taking up now with a whole new bunch of people who
21 come in with whatever motives, whether they like the idea of
22 an April hearing or not. It's just not - we don't need this
23 kind of further proceedings. It will be a delay. And there
24 are some reasons why that delay might be appropriate for
25 exclusivity arguments, but we wanted to avoid the whole

1 thing. So we essentially went back to Your Honor's remarks
2 and we crafted a different path and I think a simpler path,
3 and the path is laid out in the proposed notice and case
4 management order that we provided to Your Honor and the
5 concept that drives it is relatively simple. We have summary
6 judgment motions to file. There are a small number of those
7 motions that we intend to file, and those motions will go to
8 some of the central issues that we've been talking about:
9 product identification, hazard, statute of limitations, and
10 we have one that relates to a bunch of claims in Libby,
11 Montana where the homes, they say, are contaminated but the
12 same homes are going to be remediated or have been remediated
13 or would be remediated by the federal government with out
14 money. So, with respect to those, there's not going to be a
15 notice issue because we're going to move for summary judgment
16 and we're going to provide actual notice to all those
17 claimants, and they can come in and respond to those motions
18 in due course. So there's no notice issue. There's no
19 procedural issue. It's Rule 56, and we intend to file those
20 motions within the next few weeks. So, our case - our
21 proposed notice - I'm going to be showing our proposed
22 notice, says in the first instance, Debtors intend to file
23 motions for summary judgment on groups of certain claims
24 principally based upon lack of hazard, product identification
25 and limitations period and the Libby issue as defined below.

1 These motions may be filed and heard at any time prior to
2 April 23, which is when the hearing takes place. The motions
3 will be heard on available dates in Pittsburgh. All parties
4 reserve the right to file additional summary judgment motions
5 after April 23. So, no notice issue. No procedural issue.
6 We can move for summary judgment anytime we want. When you
7 have a disputed claim, you can do so under the rules. So
8 that is the first chunk, and it's not confined to any
9 particular group. We don't say to include the sixty-five or
10 don't include the sixty-five. In some cases they do and some
11 cases they don't, but there's no notice issue, and there's no
12 mystery because of summary judgment. Number two, there will
13 be a Dalbert hearing on March 26, 27, 28 in Pittsburgh
14 regarding the methodology issue. No other issues previously
15 described as Phase I issues will be heard at this hearing,
16 and we previously defined what the methodology issue is. So
17 that again, status quo, it's there, it's now in a formal
18 notice. The trickier part then came to what to do with
19 respect to the Phase II estimation hearing as outlined
20 previously in the CMO. What we say is that there will be no
21 hearing with respect to Phase II estimation as previously
22 outlined in the estimation CMO and other related orders.
23 Rather, consistent with what was discussed last time,
24 substantive objections previously lodged in the fifteenth
25 omnibus objection to certain claims will be tried on April

1 23, 24, 25 commencing in Pittsburgh. Okay, so we go back to
2 the notice that was given there in the rubric that was given
3 there, but we're now going to limit the objections that will
4 actually be heard to certain claimants and certain
5 objections. Which claimants? It's claimants represented by
6 Mr. Speights, claimants represented by Mr. Dies, and that one
7 group of Libby claimants who are represented by one person, a
8 Mr. Lewis in Missoula, Montana. So, we have taken off the
9 table the idea of having an adjudication of objections lodged
10 to claims where the lawyers have not been actively involved
11 in this process. Why? We'd like to do them, but we don't
12 want to get held up with a whole discussion about, well, you
13 know, what about this? What about that? We never realized
14 this or that. We'll just focus on the very people that Your
15 Honor singled out last time. So, Exhibit A are the claims of
16 those people. Now they fall into a couple of categories.
17 Mr. Speights - They're all just represented by Mr. Speights.
18 Mr. Dies has filed a 2019 form on behalf of a whole series of
19 claimants, and then with respect to an additional group of
20 claimants he has appeared as special counsel to those
21 claimants. So, he's clearly been involved in those kinds of
22 claims so we've included those as well. We spell out in the
23 notice the issues that we intend to address, and they're the
24 same ones: lack of hazard, we cross-reference the objections
25 that were made; product identification, the same thing;

1 limitations period, same thing. Additionally, to the extent
2 not previously resolved through summary judgment or other
3 proceedings because we do intend to move on summary judgment,
4 objections with respect to the category II claims related to
5 residences in the Libby, Montana area unless the property has
6 been or already will be remediated by the EPA shall be
7 adjudicated. So, the issue of the effect of the EPA
8 remediation on those claims will also tee up as a single
9 issue. We think it's going to be dispositive. So we're
10 going to tee up on the summary judgment. If there's
11 something that has to be tried, that trial will take place.
12 Following the adjudication of these claims, the debtors will
13 have the opportunity to file motions to extend the Court's
14 rulings to additional claims. If the debtors seek to extend
15 the Court's rulings to additional claims, the debtor will
16 provide additional notice to the affected claimants. The
17 Phase I and Phase II estimation previously addressed in the
18 CMO will not go forward. Estimation of the aggregate value
19 of PAD claims will take place a future date to be set by the
20 Court. So effectively, what we've done is to stay on track
21 for the hearings in February - excuse me, in March and in
22 April. We are doing summary judgments so there's no notice
23 issue. We're doing the methodology issue which has already
24 been adequately described, and solve the problem to the
25 extent that there is a problem and notice we're simply not

1 going to seek to bind any of the people who are represented
2 by - or not represented in whole or in part by Mr. Speights,
3 Mr. Dies, and Mr. Lewis. So that is the carve-out. That's
4 the concept that we've got going forward in order to stay on
5 track and consistent with that, we have then tendered as an
6 attachment to the CMO a series of dates that would lead up to
7 the hearing in April. Now, in terms of how much this would
8 pick up, it would pick up a lot, and we will furnish copies
9 of all these to counsel. As of today, as of actually August
10 the 8th, there were a total of 653 PD claims that were still
11 outstanding. These are traditional claims except the 55, and
12 you'll see that includes 55 non-traditional of which Lewis
13 represents 53, the 97 Canadian claims, and then you have the
14 501 U.S. traditional PD claims, which are divided up and you
15 can see that Speights has part of them. What we would now
16 have in the hearing in April, here we have the 52 non-
17 traditional claims, that's Lewis. I'm sorry, it's 53.
18 Speights' Canadian claims, we hope to have those back from
19 Canada but now all that we'll do is we'll file the summary
20 judgment motions with respect to those claims before Your
21 Honor and on the same timetable and if there's a factual
22 issue that has to be resolved, we can tee that up in April so
23 it dovetails right in. We then have 177 Speights claims,
24 which would include Louisiana. We then have 160 Dies claims,
25 including Louisiana, and then you can see that there are 99

1 additional Louisiana claims where Mr. Dies has appeared as
2 special counsel, the principal firms are Baggett, McCall,
3 Grant & Berl Hannas and Sills and Beard and Sutherland
4 (phonetical), and so we're really picking up out of the total
5 of 653, 585 of the claims, and given where we are in the
6 case, we think that it may not even be necessary to deal with
7 the other individually (a) because the issue has already been
8 teed up and (b) because in the context of estimation, we're
9 going to take whatever result comes out of the gateway
10 process and simply extrapolate it to the other claims if we
11 have a basis for that extrapolation. So, we don't think that
12 we really have an issue here. I will know that on the
13 summary judgment motions, one of the summary judgment motions
14 is going to be the Louisiana statute of limitations, very,
15 very clear, very clean. We'll file that. It doesn't address
16 the nolin tempest defense, but that's not a defense in many
17 of these cases, and there are other motions that we think
18 we'll be able to file with respect, for example, to
19 California on the statute of limitations. So we already have
20 those motions in mind. They're already being worked up and
21 it may be that a lot of this stuff doesn't even get to the
22 hearing, but if it does, that's what we intended the hearing
23 will cover. So, we ask Your Honor to continue on the path
24 that Your Honor took at the last time. We've sought again to
25 be flexible in order to avoid detours that will take us away

1 from our schedule, and we think that this is the only really
2 way that we can get to a hearing that would really have an
3 impact on this case.

4 THE COURT: Okay, Mr. Baena.

5 MR. BAENA: May it please the Court, Scott Baena on
6 behalf of the Property Damage Committee. Judge, I won't
7 forget the last hearing for at least three reasons for a long
8 time. The first reason is that the hearing ended so late,
9 that Mr. Sakelo and I missed our last flight out. We then
10 found out there were no hotels between here and Philadelphia.
11 We were then ejected from the DuPont for vagrancy. We went
12 then to the Marriott in Philadelphia, and at 4:30 in the
13 morning we were thrown out of there for loitering. So I will
14 not forget that hearing. The other two things that occurred
15 at that hearing that are likewise memorable and more
16 substantively connected to this case, is that firstly, you
17 jet us in for time being what was formerly referred to as
18 Phase II of the estimation proceeding in which we were
19 intending to put a value on all the extant PD claims then
20 remaining, and instead you decided we're going to proceed
21 with three objections which had been variously described as
22 the gateway objections that were asserted by the debtors in
23 their fifteenth omnibus objection to PD claims. I only want
24 to parenthetically say that the biggest problem for anybody
25 watching this case is the terminology that we employ and

1 often abuse in this case, just like I've begged that we not
2 talk about Phase II, we're now referring to these three
3 objections as gateway objections, but they're not - not all
4 of them are the gateway objections that you entered a
5 separate order in respect of a long time ago. One of them is
6 not one of those gateway objections, but you did that. That
7 was the first thing you did, and that was a very, very
8 important thing that you did, and secondly, you said to give
9 effect to all of the foregoing we were directed to undertake
10 to fashion a notice to those individual claimants who claimed
11 PD claims were implicated by those three objections that were
12 now going to be heard. It seemed pretty simple.

13 Unfortunately, the notice that was served up to us in
14 virtually non-negotiable format, was the one that you just
15 had Mr. Bernick walk you through, and rather than attempting
16 to fashion what we thought would be an easy, clear, and full
17 notice, we got this thing, and when you take the little
18 snippets out of it, as Mr. Bernick did, and ignore all of the
19 turgid commentary in there, all of the traps for the unwary,
20 it sounds pretty good. But, unfortunately, all of those
21 problems exist with this notice. For example, this notice
22 contains two lists that just start with the basics. Two
23 lists. List number one, is every claimant who had any
24 objection asserted in respect of their claim by the fifteenth
25 omnibus objection, that's the whole universe of objections,

1 and then list number two are those claims which are going to
2 be implicated in this process, and the claimants are going to
3 get a pile like this of lists which are redundant only in
4 some respects, very confusing. The notice likewise goes on
5 to say in one of the paragraph that Mr. Bernick alluded to
6 that in respect of that Phase I process that we presently
7 have on the table for methodology, it says there will be a
8 Dalbert hearing on March 26, 27th, and 28th, in Pittsburgh,
9 Pennsylvania regarding the methodology issue, and it goes on
10 to say in 6 Romanet ii, no other issues previously described
11 as Phase I issues would be heard at this hearing. Yet it
12 goes on to say at page 5 in Romanet v the Phase I and Phase
13 II estimate previously addressed in this estimation CMO will
14 not go forward. Suddenly there's been a new transformation
15 in respect to Phase I. I'm not sure that those our 65
16 claimants have any idea what any of this could possibly mean
17 since I don't even understand why the transformation
18 occurred. The proposed order and the motion are traps for
19 the unwary for the following reason: Having told Mr. Bernick
20 and the debtors to tee up everything for hearing in those
21 three groups, you just heard they decided, they decided,
22 despite what you said, that that's cumbersome. We're not
23 going to do that. We're going to take Mr. Speights, we're
24 going to take Mr. Dies, and we're going to just do their
25 claims, and the objections that we've asserted in the

1 fifteenth omnibus objection in respect of their claims alone
2 and what we have in store for those other people is we're
3 going to try at the end of the day, if we're successful,
4 maybe if we're even unsuccessful, to revisit those claims
5 with similar objections depending upon the outcome that we
6 obtain in respect to Speights and Dies' claims. And so, by
7 that, these people who - by the way, never got any notice of
8 any of this. They were not served with this. They didn't
9 know the transformation that was going on, and that's why we
10 were telling them, Why haven't you served them? Why aren't
11 they on this conversation? The retort being, Well, we're
12 just going to take you now, to Mr. Dies. Those claimants
13 will not participate in the adjudication of these gateway
14 overarching - we've heard all that terminology - objections
15 until after the fact, and in essence, they'll be served up
16 with a result in a proceeding respecting other claimants and
17 then be told how the debtor wishes to employ that result in
18 respect of their claims. Why? Just so that they don't have
19 to be given notice? This is an MO that this debtor typically
20 uses in this case particularly in respect to property damage.
21 They try to get relief in pieces and then promise to use it
22 later against others who did not participate in the process.
23 When we complained about all of this, as I said, the reaction
24 was to whittle down the list further of who was going to be a
25 participant in this process that you thought, everybody whose

1 claims was implicated by these objections would be a
2 participant in. As the Court well knows, and you even
3 remarked about this at the last hearing, the PD Committee
4 does not and cannot represent individual claimants, and so,
5 when Mr. Bernick proposes this notice and includes with the
6 notice a CMO which is date specific as to when things are
7 going to occur in respect of the fifteenth omnibus
8 objections, he's doing so without any contestant on the other
9 side. That's why we thought it was very important for PD
10 claimants whose claims were being objected to, to be
11 participants in this process. If we want to be faithful to
12 what you directed, they all had to be participants. Not only
13 weren't they participants, they weren't even given a copy of
14 what was being discussed so that they could possibly try to
15 weigh into this process if they wanted. Judge, I have never
16 - I view a CMO as a process. It's not a motion. It's
17 something to assist the parties and the Court in scheduling a
18 proceeding. I have never seen a CMO, in 32 years, I haven't
19 seen a CMO negotiated by one side to the litigation,
20 presented to the Court, and entered without the other party
21 participating in the process. Those litigants are entitled
22 to come forward. We even told them. Look, we're not even
23 talking about the date of the trial. Tell them there's going
24 to be a trial in April and then tell them we need to sit down
25 and talk about a CMO. No. This debtor wants to hand-

1 handedly shove this schedule down the throat of people who
2 haven't even been given an opportunity to appear. That's why
3 we objected, Your Honor, because we think that this process,
4 this process even giving them the benefit of good intentions
5 in rethinking failed firstly in adhering to the Court's
6 admonitions and secondly, failed miserably in giving people
7 minimal due process via notice and an opportunity to
8 participate. It failed altogether under traditional motions
9 of fair play, and we don't think that this CMO can be entered
10 with the content that the debtor has put forward. Now, the
11 CMO has another piece to it, of course, which I don't believe
12 Mr. Bernick actually addressed and that's in regard to Phase
13 I, which was the methodology issue. In regard to Phase I,
14 with the benefit of the last month, and certainly the meet-
15 and-confer that we had with the debtor to reflect on all of
16 this, I must say that I'm beginning to lose track of any
17 sense of urgency or any sense of a legal platform for Phase
18 I, as it is presently being constructed. As a procedural
19 matter, I can't conceive any longer of how - just as a matter
20 of context, Judge, how we're having a Dalbert hearing in
21 respect of an estimation proceeding that's been put on ice.
22 More substantively -

23 THE COURT: Well, pardon me, Mr. Baena, the
24 estimation hearing was put on ice because I'm now viewing it
25 as an allowance/disallowance process.

1 MR. BAENA: It's not an estimation hearing.

2 THE COURT: No, it's not an estimation -

3 MR. BAENA: That's correct.

4 THE COURT: So you can't have expert testimony with
5 respect to the allowance and disallowance of claims.

6 MR. BAENA: Judge, the issue of dust is a specific
7 objection under the fifteenth amended - I keep saying
8 amended, I apologize, the fifteenth omnibus objection to
9 property damage claims. It's E-2, I think. That was their
10 complaint against a number of claims based upon the use of
11 dust sampling, and there were different shades of that, you
12 know, that didn't show a sufficient difference between the
13 ambient there and the interior of the building or, you know,
14 it didn't show anything or whatever it was, there were
15 various grades, but those were all teed up by the fifteenth
16 omnibus objection just like product ID, the three gateway
17 objections that we're dealing with, statute of limitations,
18 and the third one which was lack of hazard. Indeed,
19 methodology may even be related to lack of hazard, but it's
20 not related at this point in time to an estimation hearing,
21 and the reason I raise this is to make sure that as long as
22 Mr. Bernick is re-engineering, that we take into account what
23 happens with this determination you make in respect of the
24 methodology issue. In the present context, it has no purpose
25 until we get to a Phase II hearing, at best, or its only

1 purpose is in essence an adjudication of the E-2 objections
2 under the fifteenth omnibus objection. Which is it at this
3 point in time? And if it's the latter, if it's just the
4 fifteenth omnibus objection, E-2, then why aren't claimants
5 directly involved in that process? Not allowed to be
6 involved as you have said so far, you know, they may be
7 involved, why aren't they involved? Why aren't the claimants
8 whose claims are challenged by them in E-2 the parties to
9 that process. There's no answer to that at this point in
10 time -

11 THE COURT: Well, I -

12 MR. BAENA: - with Phase II on ice.

13 THE COURT: Well, I thought with respect to
14 methodology that the notice was pretty clear that if people
15 wanted to participate they could. That was the whole purpose
16 to determine how a hazard, to put it in those terms, could be
17 determined. What was the appropriate scientific test to
18 determine whether or not there was a hazard or whether, I
19 guess, under the E-2 claims, those claims that relied on a
20 particular methodology passed muster. So, yes, they have to
21 get notice, but I can't force somebody to appear. If I give
22 them notice and tell them this is their opportunity to show
23 up and they don't, they can sustain a default judgment.

24 MR. BAENA: But this is an adjudication in reality
25 of the E-2 objections against specific claims, and it's not

1 being advertised that way. It's being advertised as Phase I
2 of an estimation proceeding. Now, Judge, if you go back to
3 January '05 when we first discussed this concept, you'll
4 recall that the methodology issue was being teed up so that,
5 you know, the Court would come to a conclusion about dust
6 sampling and then the estimators would say, Well, I can't put
7 a value on this or I'm going to put a value like that on this
8 by virtue of your decisions, as opposed to this stealth-like
9 attempt now with no estimation going on to adjudicate E-2
10 objections to property damage claims when the parties whose
11 claims are being implicated by that objection haven't been
12 given any more than a precatory invitation to participate.
13 And, Judge, the point is -

14 THE COURT: I don't think the order -

15 MR. BAENA: - they don't understand it.

16 THE COURT: Well, I don't think the order was
17 precatory or an invitation. I think it was an order that
18 says, We're going to trial on this date on this issue, and if
19 you intend to participate then do whatever discovery you need
20 and show up, and if you don't, be prepared to lose.

21 MR. BAENA: Yes, Judge, and we told them it was part
22 of an estimation of claims, and we did tell them that it may
23 be even binding on them although in the last hearing you
24 thought that we were talking about Phase II in that regard.

25 THE COURT: I did.

1 MR. BAENA: So, I mean, what are the claimants
2 thinking? And to top that all off, they haven't even been
3 served up with the opportunity to comment on all of this.

4 THE COURT: Frankly, folks, I've had enough of this
5 notice issue. You folks are either going to get a notice
6 that you are satisfied with on these issues on the property
7 damage claim and submit it by the end of the week or I'm
8 doing my own, that's it, because I know what I'm expecting,
9 and apparently I can't seem to communicate it on the record.
10 I guess maybe I'm going to have to try in writing. Some of
11 the things that currently appear in the debtor's proposed
12 estimation - not estimation, pardon me, case management order
13 - wait till I find the correct one here, just a minute,
14 please.

15 MR. BAENA: Are you looking for the notice, Judge,
16 or the order?

17 THE COURT: I was actually looking for the notice
18 that had the proposed order attached to - Oh, wait - No,
19 that's not it, and I know I have it here because I just
20 looked at it a few minutes ago, but somehow in shuffling
21 pages -

22 MR. BAENA: There was an amendment too, Judge, that
23 was made Friday.

24 THE COURT: Friday.

25 MS. BAER: Your Honor, I have the certificate of

1 counsel with an order and the notice.

2 THE COURT: Okay, may I have a copy because it may
3 be easier rather than my wasting your time to look at this.

4 MS. BAER: (Microphone not recording.)

5 THE COURT: That's okay. I have some concerns about
6 some of the language that is contained in this. With respect
7 to - Let me try to deal with things in some order. First of
8 all, with respect to what the debtor wants to try in April, I
9 want to deal with the April hearings for the moment. If the
10 debtor wants to go forward with claims adjudication as to
11 people who have been represented by Mr. Speights, Mr. Dies,
12 and the Prudential claims, those attorneys were here, I did
13 not think they needed additional notice with respect to that
14 information because they have been here and basically,
15 consistently throughout the case. So I thought that the
16 discussion on the record, as to them, was adequate as to what
17 would be tried in April. I did expect that the debtor was
18 going to prosecute all of the other objections that are the
19 same as objections to the Speights claims or to the Dies'
20 claims at one time. I do not know that the debtor has the
21 ability to essentially *nunc pro tunc* something into a Rule 42
22 common issues trial, I don't know that you can do that. So,
23 to the extent that someone doesn't have notice that the
24 issues that may affect them are going to trial on a certain
25 day, I don't know that you can simply pick up that ruling and

1 say, Now we're going to try to apply it to your case because
2 there may be different facts.

3 MR. BERNICK: Our goal, Your Honor, is to get the
4 April trial to accomplish what it needs to accomplish, and we
5 thought that this is a way of avoiding a controversy about
6 notice and more delay. If Your Honor is prepared to craft a
7 notice that will hold to that date and include those people,
8 we'd love to have everyone there at the same time.

9 THE COURT: I think that's what the discussion was
10 all about at the last hearing.

11 MR. BERNICK: That's what I thought as well.

12 THE COURT: So, the only issue is getting the notice
13 out to those folks to say this is when the trial is going to
14 occur. Now, Mr. Baena, normally I would expect that anybody
15 who wants to have some input into a scheduling order is going
16 to have that input into a scheduling order. The difficulty
17 at this point is it's getting so late. I think the Court has
18 the right on its own to determine the control of the calendar
19 before it and to set reasonable dates, and if that's what I
20 have to do, that's what I'm going to do, and if somebody has
21 an objection to it, they can certainly raise it, and I'll
22 hear it, and if that objection has merit, then I'll change
23 the dates as need be, but I think at this point I expect to
24 go forward with an order that says, This is the order, and
25 you've got so many days to raise an objection as to why it

1 won't work for you as to one specific case or however many
2 specific cases, and I'll hear it at the next omnibus, if
3 that's necessary, but I think it's time to get the discovery
4 open and going. So, I want to get an order out that will
5 start the discovery, and then if people have some concern
6 about the specific dates, I'm happy to hear it at the next
7 omnibus, but I intend to issue an order that says, these are
8 the dates. If you have an objection, you know, file it and
9 come to the next hearing, and I'll address it as to specific
10 claims, not to change the whole schedule for entities that
11 don't object. Am I being clear?

12 MR. BAENA: Yes, Your Honor.

13 THE COURT: Okay. I'm not sure if I'm making myself
14 understood or not.

15 MR. BAENA: I understand. I would just ask that
16 they have a sufficient amount of time to complain. I'm not
17 sure that giving them till the September omnibus - by the
18 time this gets served on people -

19 THE COURT: The September omnibus hearing is on
20 September 25th and I would suspect that this order ought to be
21 able to be served at least by next week. That will give them
22 a month. That's surely enough to figure out whether a
23 discovery plan is sufficient. Mr .Dies.

24 MR. DIES: Your Honor, Martin Dies appearing for the
25 Dies & Hall claims and apparently the last appearance as

1 special counsel for Phase I to the Committee. On the
2 procedural issue, the concern I have is for some period of
3 time now, most of the year, I have been acting as special
4 counsel for Phase I, and with the current proposal, I'm out.
5 That's fine -

6 THE COURT: Well, Mr. Dies, I'm not to Phase I yet.
7 I'm only addressing the April hearings. I haven't backed
8 into the March hearings yet.

9 MR. DIES: I know, but I'm talking about Phase I,
10 the April hearing.

11 THE COURT: But I'm talking about Phase - It's not
12 Phase II anymore, I'm talking about the April hearings. I
13 don't want to talk about the Phase I hearing yet. I want to
14 set up and tee up the trials that are going forward unless
15 there is something in the methodology that's going to impact
16 the April hearings that you're trying to tell me about. If
17 that's the case, I'll hear whatever concerns you have.

18 MR. DIES: Well, my concern about the methodology
19 issue is by pulling down the special counsel there are a lot
20 of claimants out there that may proceed if there were being
21 represented and now they're not and I don't know if there's
22 enough notice there for those claimants to come and
23 participate in Phase I because if they're trying to apply
24 that later to Phase II that's a real problem.

25 THE COURT: Well, that's what I'm asking. What in

1 Phase I is going to be applied to the April trials?

2 MR. DIES: Well, that's anybody's guess when you
3 read all these iterations, but it looks to me like Mr.
4 Bernick now is trying to apply whatever ruling comes out of
5 the Dalbert hearing, use dust sampling, can't use dust
6 sampling to Phase II which begins a month later. So, you -

7 THE COURT: The issues on the statute of limitations
8 I don't think will be affected by dust - whatever ruling
9 there is on dust sampling.

10 MR. DIES: It's certainly going to go to hazard, and
11 I want to talk about hazard.

12 THE COURT: May go to hazard.

13 MR. DIES: Yes, it goes to Series E objections to
14 hazard and under the schedule the claimants would have a
15 month or less to know whether they're supposed to or they can
16 use dust sampling or not, and it's simply impossible to get
17 that done. I want to -

18 THE COURT: But they've already either got it done.
19 I mean at this point, in order to have filed a claim, they
20 have to know what the basis for their claim is. So, they
21 should already have that done. I'm not looking at giving
22 them time to get the dust sampling done. It's either done or
23 it's not done or else if they've got claims filed and they
24 want to rely on it, they'd better go get it done. I'm not
25 going to hold up the rest of the world for people to go get

1 dust sampling or some other asbestos testing. They filed
2 claims. It's their burden to prove their claim.

3 MR. DIES: Your Honor, I want to come back to that
4 and I want to back up for just a minute because I don't think
5 anybody has talked about this, sort of take a deep breath and
6 say, Where are we and what have we accomplished? What I'm
7 going to say are purely my thoughts. They're not anybody
8 else's, and I haven't shared this with anybody else, but
9 there is perhaps the implication here somewhere that we
10 haven't accomplished a lot in terms of the agreements that we
11 have, and I want to talk about that.

12 THE COURT: In terms of what, sir?

13 MR. DIES: The agreements that have been
14 accomplished by property damage and bodily injury.

15 THE COURT: Well, I don't know what they are. I
16 don't know whether there's anything that's been accomplished
17 or not.

18 MR. DIES: I just want to talk about that -

19 THE COURT: Okay.

20 MR. DIES: - for a minute, Your Honor.

21 MR. BERNICK: (Microphone not recording.)

22 MR. DIES: And may I not be interrupted, please.

23 MR. BERNICK: I'm sorry. I'm addressing the Court
24 and I want to raise a point of order here.

25 THE COURT: Can you use the microphone, I can't hear

1 you, Mr. Bernick, I'm sorry.

2 MR. BERNICK: Yes. We have a lot of stuff to do
3 today, and it sounds like what we're going to get are some
4 reflections by Mr. Dies on the significance of the agreement
5 that was reached between bodily injury and the property
6 damage people. We would have a lot to say about that
7 agreement. In fact, we've been trying to learn the details
8 of the agreement, and we've been unable to do so. We have
9 some documents, but we don't know a key aspect of it which is
10 what preclusionary effect does it have on any further
11 negotiations in the case. I wasn't going to raise any of
12 this. These are all fair game at the exclusivity hearing,
13 but we're going down a road that takes up the time of
14 everybody in this court when the top priority for today, I
15 think, should be to get a CMO and a notice, because we've
16 been working on it for the better part of 15 months. You
17 told us a year ago last spring to go get it done. So on the
18 verge of getting it, Your Honor has said, it's just a
19 question of giving people notice. If Mr. Dies has got
20 something to say with respect to notice, that's fair and
21 appropriate. After all, he represents claimants, but I don't
22 think this should be an opportunity now to get us in
23 discussion at 4:15 in the afternoon about where this case is
24 going.

25 THE COURT: Well, okay. Mr. Dies, I have not heard

1 any of the parameters of the agreement, and as I understand
2 it, since it's still for some settlement purposes I probably
3 can't hear any of those parameters. So, as far as I can tell
4 from where the Court sits, there is no agreement, because
5 nothing's been filed of record, and these claims need to be
6 adjudicated one way or another.

7 MR. DIES: Your Honor, it's certainly true that the
8 terms haven't been told to you and I don't intend to do that.
9 That was not my purpose. We have produced the terms to the
10 constituencies, but the reason that I wanted to just stop and
11 take a moment is that my understanding is, listening to the
12 last hearing and Mr. Frankel said this in reference to Your
13 Honor is that the litigation ought to be designed to reach a
14 consensual plan and be necessary for a consensual plan and to
15 see whether we're on those tracks, and we've accomplished a
16 great deal in this bankruptcy so far. We've spent an
17 enormous amount of time getting the agreements. I'm not
18 going to go into the substance of the agreements, but we've
19 spent a year working on these agreements. So, I think that
20 at least we should say, Is the litigation Mr. Bernick is
21 proposing, is that designed to reach a consensual plan and is
22 it necessary? And I don't believe it is.

23 THE COURT: There may not be a consensual plan, Mr.
24 Dies. I mean, from what I've been hearing from the folks all
25 plan negotiations have essentially stopped. So, even if

1 exclusivity were to be terminated, that's not going to get
2 you a consensual plan. The debtor's going to go down one
3 track and other entities may go down another. So to the
4 extent that the debtor wants to prove that certain claims are
5 not properly to be calculated in either the estimation
6 process or are disallowed, I think the debtor has the right
7 to do it.

8 MR. DIES: Your Honor, I understand that that is
9 your view, and I will not persist in talking about this
10 except to say that - and maybe I am the optimist, but I do
11 not believe that all work has stopped on a consensual plan,
12 and I still believe it's possible if the proper framework is
13 there for discussions. So, I'll leave it at that, Your
14 Honor, and I want to go now to this proposal, and you asked
15 me to address Phase II. Your Honor, the Phase II proposal
16 with the deadlines set out that have been proposed, in my
17 judgment, I've already talked about my belief it doesn't go
18 toward a consensual plan. I understand you believe they've
19 got a right to do it, but it's unmanageable, Your Honor. It
20 is not manageable. And there are a lot of reasons for it.
21 I'll be brief about this, but in the debtor's motion they
22 said that the gateway objections, limitation, hazard, prior
23 settlements implicate more complex evidentiary issues which
24 involve liability and damage concepts. True. However this
25 proposal is not faithful to that statement. The shortened

1 discovery period here does not allow me or Mr. Speights or
2 any of our claimants to present the evidence on these issues,
3 and the problem I see with it is, it basically dampens down
4 our ability to present the evidence that is necessary for you
5 to understand the background of these cases and why
6 evidentiary issues are important.

7 THE COURT: I understand why the evidentiary issues
8 are important, it's because I have to adjudicate them because
9 the parties haven't come to a consensus. So, we rule it.

10 MR. DIES: Yes, Your Honor. Yes, Your Honor, but
11 the - Let me just take hazard, lack of hazard as it's been
12 discussed by Mr. Bernick. It really is a misnomer, in my
13 judgment. In the August 29th, '05 CMO it listed the five
14 gateway objections which had to do with no product ID,
15 insufficient supporting documentation, incomplete claim form,
16 barred by limitations, latches, or settlement. There was no
17 mention of hazard. There was no mention of that whatsoever.
18 That order, Your Honor, was the order that was served on all
19 the claimants, as I can tell. Then in the fifteenth omnibus
20 objection, hazard comes along. Well, hazard by any
21 definition, Your Honor, is not really some gateway objection,
22 and let me explain why, Your Honor. The debtors have
23 constructed this so-called requirement that you must have air
24 sampling, you must have certain levels of air sampling in
25 order to have a hazard. There is no such requirement. That

1 really is not a gateway objection. That's just part of their
2 evidentiary case. That's part of their affirmative defense.
3 That's all that is. The proof of claim form, Your Honor, had
4 nothing in it that said, If you don't file all your liability
5 evidence, you're out. In fact, we've been allowed to
6 supplement the claim form. Your Honor has said from the
7 beginning we could, and many claimants, many of my claimants
8 have done so, and the problem is that they're treating this
9 as if it's some requirement. Now, what the Court doesn't
10 know, and I'm not going to waste a lot of time going into
11 this, but you really need to know this is, building owners
12 don't normally perform air sampling, and they certainly don't
13 do it outside of abatement or primary assessment, and the
14 reason they don't is EPA has continually said since the late
15 1980s that air sampling is not to be used as a primary
16 assessment methodology. Visual method is a licensed asbestos
17 abatement inspector determining the condition of the
18 material, the location, accessibility, and all these things.
19 So, the building owners don't as a matter of fact do that
20 type of air sampling because the regulatory authorities have
21 always said don't use it as a primary assessment methodology,
22 in fact, EPA says, it is inaccurate for that purpose and they
23 say - if you give me one second here, they say that, In
24 essence, if you rely only on air sampling, it will endanger
25 the health of the occupants of the building because of the

1 limitations of air sampling and because it simply cannot tell
2 you when the levels are going to be reached because of fiber
3 release. Now, what Mr. Bernick is using as a gateway
4 objection is the same argument that Grace made in its appeal
5 way back in the late 1980s, early '90s in the Safe Building
6 Alliance case versus EPA. Grace took the position and
7 appealed EPA's promulgation of regulations under the AHERA,
8 Asbestos Hazard Emergency Response Act of 1987 and said EPA
9 was wrong because EPA did not determine a safe level of
10 exposure to asbestos to be applied in buildings and, two, EPA
11 did not say that air sampling was the primary assessment
12 methodology or sole assessment methodology. They made this
13 argument on appeal to the DC Court of Appeals, and the Court
14 of Appeals soundly rejected that argument. So, what happened
15 with the litigation was the argument they use about meeting
16 some undisclosed level of air sampling became part of their
17 evidence in their affirming defenses, in every single case in
18 the litigation there is no state that I'm aware of either by
19 statute or by court law has ever adopted the idea that air
20 sampling is a primary assessment tool. In fact, all the
21 states that I represent, Arizona, Connecticut, Texas,
22 Arkansas, Oklahoma, and all the states adopted various
23 portions of AHERA, AHERA is applicable, most of the states
24 made the AHERA statutes more stringent than the federal
25 statute, and the methodology that has been adopted by the

1 states and used by the building owners is in fact as a
2 primary assessment methodology is the EPA visual assessment
3 method. So, when you say if building owners didn't have dust
4 sampling or air sampling at the time of the proof of claim,
5 they couldn't file it. They could not file that at the time
6 the proof of claim, they came along because they don't do
7 that.

8 THE COURT: Okay. Then, let me back off that
9 statement and say it this way: If they don't have some
10 evidence of what the hazard is, they don't have a proof of
11 claim they can file. So whatever evidence they're going to
12 rely on, I expect at this point they have. If it's not air
13 sampling, okay. If it's not dust sampling, okay, but it must
14 be some evidence. It's their burden of proof and at this
15 point in time this case is five years old -

16 MR. DIES: Yes, Your Honor.

17 THE COURT: - and the bar date for property damage
18 went by a long time ago. So, at this point, I don't find it
19 to be a credible objection to scheduling the matter for trial
20 that the parties need to go out and get their proof together.
21 They've had five years to get their proof together.

22 MR. DIES: But, Your Honor, there was never any
23 requirement that said what they had to have.

24 THE COURT: Well, that's why you wanted to do the
25 methodology trial.

1 MR. DIES: Yes, and there's been no decision on
2 that.

3 THE COURT: That's because we haven't done the
4 trial.

5 MR. DIES: And dust sampling is extremely expensive.
6 Usually it's the type of thing when they hire counsel in a
7 cost-recovery case, like Mr. Speights and myself, that's what
8 we go out and hire experts to do. Occasionally some of them
9 have that, but because EPA always says use the visual method,
10 that's what they have.

11 THE COURT: But the visual method only tells them
12 whether or not there is some asbestos product in place. It
13 may, in the best of all possible worlds, say, you know,
14 monokote on it so you know which debtor that you actually
15 have a claim against for the product itself, maybe, in the
16 best of all possible worlds. You still have to prove your
17 claim. You have to prove that this debtor did something that
18 led to a damage that's compensable against this estate for
19 that claimant. Now, if they don't have it, they can't file a
20 proof of claim.

21 MR. DIES: First of all, Your Honor, the visual
22 assessment method requires that a EPA certified inspector
23 come in and assess the condition and material -

24 THE COURT: Okay.

25 MR. DIES: - assess-ability and propensity -

1 THE COURT: Then they have to have something.

2 MR. DIES: - and some claimants will have that.

3 THE COURT: Okay.

4 MR. DIES: And other claimants might or may choose
5 to use dust sampling but because the Court has not determined
6 that that methodology's available, did not want to spend the
7 money to do that -

8 THE COURT: But that's what the Phase I trial is
9 supposed to be about, to determine whether dust sampling is
10 an appropriate methodology.

11 MR. DIES: Yes, Your Honor, and if it's disallowed,
12 then they would have spent a lot of money for methodologies
13 that were not admissible in this Court.

14 THE COURT: Okay, so, your view, if I understand it,
15 is, we should continue down the road of doing the dust
16 sampling trial, not necessarily for estimation purposes but
17 because we need a ruling as to what level of proof, I guess
18 I'll use those words in a global sense, I'm not using them as
19 terms of art -

20 MR. DIES: Yes, Your Honor.

21 THE COURT: - the debt, the claimants have to
22 produce in order to show that Grace may be liable to them for
23 some product-based damage. So, we should go forward on the
24 dust sampling, whether it's for estimation or for each
25 individual claimant's use, we need a ruling on the dust

1 sampling. So that's what currently is set for the March
2 phase. Then your issue is, that if in fact there's a
3 determination that you can't use dust sampling, those people
4 who already have dust sampling and only that, need some
5 additional time to get additional evidence to meet their case
6 and if there's a ruling that says dust sampling is
7 appropriate those claimants that don't have it may want to go
8 get it. So a month between then and the hazard trial isn't
9 enough time.

10 MR. DIES: Yes, Your Honor, I believe that is
11 correct, and excuse me for not being able to talk very well,
12 I'm taking medication that causes that, but I believe that we
13 have told the claimants since day one, the Court is going to
14 determine the methodology, and until it's determined, a lot
15 of claimants did not do it, would not do it simply because
16 that's not what's done in the real world in terms of what
17 they already had when they filed the proof of claim. Now,
18 some do have it. Some of my claimants do have it, and I
19 think that you will find that many claimants have assessed
20 the buildings under the EPA method, they'll be able to show
21 that in fact there are conditions that constitute a hazard,
22 but I think the problem is more than notice here. Until the
23 Court decides, I just don't think most claimants are in a
24 position to know what that is.

25 THE COURT: Okay. I was going to get back to the

1 Phase I issues later and I still will. I think we need to go
2 forward on the Phase I issue. At the recess, which I'm going
3 to take before I make any rulings on this, I think you folks
4 should talk, Mr. Bernick, Mr. Dies, and Mr. Baena, about
5 whether the hazard part of the April case should be postponed
6 until there's a ruling on the dust sampling.

7 MR. BERNICK: I think, Your Honor -

8 MR. DIES: Excuse me, Your Honor, may I finish
9 because I'm not quite finished -

10 THE COURT: Well, folks, you've got five minutes,
11 Mr. Dies, and then we're taking a recess.

12 MR. BERNICK: May I be heard before the recess?

13 THE COURT: All right, you've got five minutes too,
14 but I'm counting. This is on the clock, so go.

15 MR. DIES: This is a very important issue. They've
16 also listed the Louisiana claimants, I assume those for which
17 I have some responsibility, but I am not counsel of record.
18 These people, most of them, as Your Honor knows, went through
19 the Katrina issue and so on and so forth, and they are today
20 under the impression that we're going to determine, as you
21 said, Phase I. Now, as of today, if the Court accepted the
22 proposal in October, they're going to be on a plan to
23 adjudication schedule. I don't think that is fair. I don't
24 think they're in a position to do that. So I do think, I do
25 think the first thing we need to do is to have a

1 determination of what methodologies are in fact acceptable to
2 the Court.

3 THE COURT: All right. With respect to the
4 methodology issue we're going to have some information on it,
5 some trial, some proceeding on methodology. So, that will
6 happen.

7 MR. BERNICK: Excuse me, can I have the - I would
8 like to address the Court before the recess. I think that
9 counsel for various property people have now gone on for
10 about 50 minutes. I think I took about 10 minutes to lay
11 this issue out. There are many, many things that have to be
12 heard, and frankly, Your Honor, I think there's a fundamental
13 issue that we have here about whether in fact we're going to
14 have an orderly proceeding, and all I'll say for my arguments
15 is this: Your Honor, they had to submit in response to the
16 claim forms at the beginning a lot of information. And to
17 justify having to do that, we talked about all of the
18 different kinds of issues that applied, and we specifically
19 put them on notice that we wanted to know the basis of their
20 claim so that we could determine whether the claim was
21 meritorious or not. We had to litigate all of that. It was
22 done in the answer to the claim forms. Now, that was in
23 2002. We then got to the question of the CMO. That question
24 now is almost 18 months old, and we proposed - CMOs, we
25 proposed all these different things, so we have now spent the

1 better part of 18 months dealing with this issue.

2 THE COURT: Well, we're not going to deal with it
3 any longer than today, so, let's get through it.

4 MR. BERNICK: That's fine. Now here is, I think,
5 the way that it works very simply. They have known since
6 September on a claim by claim basis of all of these different
7 issues, and they've had the opportunity since then to make
8 whatever preparations they want. When we laid out the CMO in
9 the process, it is summary judgment, and I haven't heard
10 anybody quarrel with the idea of having summary judgment, we
11 also have got the benefit of all the claims objections and
12 responses and that's not just a notice pleading deal. That
13 is, what is the basis for your claim? So we have the claim
14 form. We then have the objection process. They've had all
15 kinds of time in which to determine what they want to proffer
16 in support of their claims. What they're essentially saying
17 now is, Gee, Judge, decide this on an issue-by-issue sequence
18 basis so that we can learn in advance of trial what it's
19 going to take to prove up our claim, and that's not the way
20 that it works. This is very mature litigation. Sometimes
21 people rely upon dust. Sometimes they rely upon air.
22 Sometimes they rely upon observation. They make that choice,
23 and we've got a bunch of people who relied upon dust. We want
24 to litigate whether that evidence can come in as a straight
25 Daubert issue, is the evidence admissible or not. We did

1 this in the Armstrong case. Judge Newsome took up the issue
2 as a Dalbert issue. You hear all this discussion about what
3 happened in the prior litigation at the state court level.
4 In federal court, in bankruptcy, it is state substantive law,
5 and the Federal Rules of Evidence that govern, including
6 Dalbert. So we should be talking about Dalbert as a gate-
7 keeping function with respect to whatever they produced on
8 hazard. So, we would have the dust sampling hearing as a
9 straight Dalbert hearing, just like it would happen in
10 Armstrong. This is a toxic tort case. This is routine in a
11 toxic tort case, is to take up these kinds of issues. Your
12 Honor then rules. That defines the evidence that will be
13 admissible in April. Now we sought to have all that be moved
14 to January, that is dust in January, and we were told that
15 they didn't want to do this. So we agreed to their schedule.
16 They said April - March and April. They insisted upon March
17 and April, so we used March and April. Now they're coming
18 and saying, Oh, it's March but then it can't be April, it's
19 got to be May. They have taken the position, I can't tell
20 you the calls that took place insisting that it be March and
21 then April. Whatever Your Honor determines on dust, we then
22 go forward to have the hearing essentially on the merits, and
23 the hearing on the merits on hazard is not some esoteric,
24 Gees, I never heard - this is a products liability case. Is
25 there an unreasonable risk of harm or not? Just like what we

1 had with ZAI. So that's a science issue. We know the
2 scientific methodologies that they seek to rely upon. We
3 deal with one of them in March, which is dust. Whatever
4 happens happens, and then we have the issue, the science
5 issue gets posed in April. Have they demonstrated not what
6 the EPA recommends to be able to remove asbestos - have they
7 proven up an actionable tort based upon an unreasonable
8 hazard, which is a science issue, and they come in with their
9 science experts. They've got them all lined up. Mr. Dies
10 has already identified them last fall. They go on for pages
11 and pages and pages. This is a massive effort, Your Honor,
12 to whittle away at these gateway issues and defer, defer,
13 defer. This is not new litigation. It's old litigation.
14 They've got the experts. They've got the notice, and for
15 them to stand up and say, This schedule is too short. It's a
16 schedule they insisted upon not three or four weeks ago and
17 that we acceded to. Your Honor, we have got to get these
18 issues litigated, and for these folks to say that somehow
19 they're not ready yet, they've been litigating these issues
20 for 20/25 years, and if all that Mr. Dies says is true, and
21 they're not really gateway issues, and really the evidence is
22 far too complex, he can show Your Honor then and Your Honor
23 can decide, I don't think this is a gateway issue.

24 THE COURT: Okay. I don't have a gong. Your five
25 minutes are up. Mr. Speights, five minutes and then we're

1 taking a recess.

2 MR. SPEIGHTS: Well, Your Honor, I would,
3 respectfully, urge that we take a recess and give me ten
4 minutes, because I have never spoken on this issue, and I was
5 just invited to the party when we did away with estimation
6 and we made this a claims objection procedure. I promise you
7 I don't want to talk theology. I don't want to talk
8 constitutionality and notice. I don't want to talk about the
9 history of the CMO and the history of this or that. I want
10 to be constructive with you as the guy for better or worse,
11 who has tried more of these cases than anybody else, and go
12 through the CMO and tell you what it is that I think needs to
13 be clarified in order that we can go through this process.

14 THE COURT: Fine, talk to the parties during the
15 ten-minute recess, and see if you can come to some agreement
16 about that, Mr Speights, and if not, I'll hear you because by
17 the end of the day today, we're going to have an order in
18 process. We're going to have the trial dates already set,
19 and hopefully kept, those dates kept, but nonetheless the
20 process is going to be fixed today.

21 MR. SPEIGHTS: I understand that, Your Honor, and as
22 soon as I leave the rest room I'll talk to anybody who'll
23 talk to me.

24 THE COURT: All right. We'll be in recess for ten
25 minutes.

1 (Whereupon at 4:35 p.m. a recess was taken in the
2 hearing in this matter.)

3 (Whereupon at 4:53 p.m. the hearing in this matter
4 reconvened and the following proceedings were had:)

5 THE COURT: Mr. Speights.

6 MR. BERNICK: Your Honor, I'm sorry. Before we go
7 forward, I . . . (microphone not recording) discussions about
8 CMO and in the interest of time I thought it might be
9 worthwhile for us to report on whether there's any agreement
10 regarding scheduling and then perhaps -

11 THE COURT: Of course.

12 MR. BERNICK: - get each sides different views on
13 the schedule so that maybe we can have Your Honor then be
14 able to reflect on that and then proceed to other matters on
15 the agenda. We've already heard argument for close to an
16 hour from the other side. I got five minutes to respond on
17 other aspects, there have been discussions of notice, you
18 know, this kind of litigation, and, you know, a lot of things
19 have been said that I'd like to respond to but to hear now
20 Mr. Speights' version of the same thing, I just don't think
21 is fair, and I don't think that it's appropriate in light of
22 the time.

23 THE COURT: Well, Mr. Bernick, we're going to be
24 here, and we're going to get through the agenda. So any of
25 you who need to make phone calls for hotels or rides home go

1 do it, because we're going to be here. Mr. Speights, go
2 ahead.

3 MR. SPEIGHTS: Thank you, Your Honor, and I will be
4 brief because I think I probably have the longest trip except
5 for Mr. Baena and Mr. Sakelo facing me, but it is important
6 because now we're involved with objections and not
7 estimation, and I do have apparently the most claims in this
8 bankruptcy, and I want to be constructive. Here are my
9 problems with the papers that have been - I'm referring to
10 the papers that were sent to me by e-mail last Friday. I'm
11 not sure because I was a claimant on the Committee, but I
12 certainly got them and I certainly have read them. The first
13 problem I have is, I don't know the meaning of methodology.
14 There's a long history before you. I could go through all
15 the ways that could be interpreted based upon the litigation.
16 Is it the methodology for taking or measuring dust? Is it
17 the methodology for measuring debris? Is it the methodology
18 for air sampling? Et cetera, et cetera, et cetera. My
19 problem would be solved by a simple motion or a simple
20 stipulation or maybe even a letter from debtor's counsel
21 saying, This is what we want to try, methodology. In 25
22 years in the tort system, that is always done by motion in
23 limine to keep out dust sampling or whatever it is, and we
24 have briefed it and argued it and fortunately prevailed on it
25 in courts around the country, but I really want to know what

1 it is that I'm litigating. Problem number two is, Your
2 Honor, that the problem that Mr. Dies alluded to and that is
3 the chicken and egg, the problem of when you do the
4 methodology trial. I'm not standing here resisting a
5 methodology Dalbert hearing. The real world is like this,
6 Your Honor, the real world is, and I have a number of
7 clients, they find out they've got fry-able asbestos, which
8 means it can be crumbled like Grace's monokote product. They
9 hire an expert. The expert informs them of what needs to be
10 done about it, manage it in place upon renovation or
11 demolition perhaps, remove the material, and the building
12 owner is then required to do certain things by OSHA
13 regulations. The OSHA regulations themselves directed to
14 asbestos in buildings would fill up boxes and boxes of
15 materials, by EPA regulations, by EPA guidance documents, and
16 largely because of state health departments which have
17 extensive regulations in many cases on what to do about the
18 asbestos. That's what the building owner does. When you
19 send out a bar order, yes, I have monokote and yes, I have a
20 claim, and yes, here are the documents that I have, but the
21 building owners that I represent, rightly or wrongly at that
22 point in time, did not think that, well they should prove
23 their case on liability by what the debtor knew or to out and
24 hire experts, et cetera, et cetera. If Your Honor wants to
25 try the building owners' individual cases to try the

1 objections, we understand that. I'm not here to argue
2 against that today, and if that's what Your Honor wants to do
3 in March or April or whatever, I understand it. But, Your
4 Honor, the chicken and egg is, that if we're going to have a
5 trial on the merits of the claims, we need to know what it is
6 that we use, what tools to convince you that the product is,
7 and I'll use the term defective or whatever the standard
8 might be, and so there must be a reasonable spacing between
9 the methodology trial and the so-called hazard issue. I
10 would suggest 90 days, but I'll come back to that in a minute
11 because I want to get to the next problem, Your Honor, which
12 is sort of related as I read this CMO the debtors have
13 proposed. The debtors have proposed, I think, to try gateway
14 objections in April, and I don't believe hazard is a gateway
15 objection. We can go back and forth on it, but to the extent
16 they want to try gateway objections as you first articulated
17 that in the hearing a year or two ago, I wasn't there, but
18 I've seen the transcript, that's fine. We can try gateway
19 objections in April with respect to my clients. I don't have
20 a problem with that, but I don't think hazard is a gateway
21 objection for several reasons. First of all, Your Honor, I
22 don't think that it's a part of a proof of claim form which
23 required us to produce a lot of documents, which I thought
24 primarily because they wanted to raise the statute of
25 limitations issue, that we had to prove our case. But

1 leaving that aside, I don't now what hazard means, and I say
2 that to you honestly. I mean as somebody's whose been out
3 here since '82 involved in this litigation, I don't know what
4 hazard means, and I'm quite sure that Mr. Bernick's
5 definition of hazard and my definition of hazard are quite
6 different. The way we refer to it in the tort world is, is
7 there injury? Is there injury? And in some states, and this
8 varies greatly from state to state, in some states, as Mr.
9 Bernick said, you have products liability law governing these
10 and the test would be unreasonable risk of harm. Is that
11 what he means by hazard? I'm not sure, but in some states,
12 if that's the standard, the debtor would go forward and show
13 there's an unreasonable risk of harm. To whom? States vary
14 on who the unreasonable risk of harm must be to. Some states
15 might suggest there must be an unreasonable risk of harm to
16 human beings. Other states would say in context of product
17 liability acts, or in some instances product liability common
18 law that the patient here, the real plaintiff is the
19 building. It's a property damage case, and the question is
20 whether the contamination of a building causes property
21 damage, is the contamination of a building with a known
22 carcinogenic material an unreasonable risk of harm. But
23 that's not all just on that one standard, unreasonable risk
24 of harm. There's also the question of what test because in
25 many states you have the consumer expectation test. In some

1 states it is a question of whether the consumer would think,
2 would have bought that product if it had known of its
3 characteristics, that is, it contains a carcinogen, and that
4 is a valid argument I made in cases against Grace in some
5 states. I wish I could make it in all of them, but frankly,
6 I can't because the law varies from state to state and then
7 you've got the question just on products liability law, the
8 question not only of unreasonable risk on the consumer
9 expectation, when do you measure that? Do you measure it
10 when the consumer bought the material in '68 or '70? Or do
11 you measure it in terms of what we think today in 2006? But,
12 Your Honor, that's not all because we're not limited to
13 products liability. We have the problem here, not a problem,
14 we've got the real world out there, that some states don't
15 require unreasonable risk of harm. For example, the Chief
16 Judge of the South Carolina Federal District Court ruled,
17 consistent with many cases, that under South Carolina
18 warranty law, which goes back to the 1700s, you don't have to
19 show unreasonable risk of harm. You can show the product is
20 defective in other ways besides unreasonable risk of harm.
21 So that Anderson Memorial Hospital itself, a claimant in this
22 bankruptcy, with Monokote in its building wouldn't even have
23 to show. Would it have to show hazard? I don't know what
24 Mr. Bernick would say to that, but South Carolina warranty
25 law would not require that. Then we have the Wisconsin

1 Supreme Court, which in a case tried against W.R. Grace and
2 appealed to the Supreme Court ruled that nuisance applies to
3 these causes of action. You don't have to prove hazard. You
4 don't have to prove unreasonable risk of harm. So, Your
5 Honor, when I look down there at hazard, I see all sorts of
6 problems. Now, if we're trying the case itself, and we're
7 trying to show that to resist the objection, we'll have to
8 prove what the injury is, and if it's a state that requires
9 unreasonable risk of harm to humans, we'll have to do that,
10 and if it's another situation, we'll have to do that, and if
11 we have that time between, that time between the Dalbert
12 hearing and the actual trial, we'll be able to know what
13 methodologies are available to show that if in fact we need
14 any methodologies, but, Your Honor, the problem on this, the
15 fly in the ointment here, is the debtors - and I'm not trying
16 to be anything but positive here, but it's the debtor's
17 desire to try hazard as a part of the gateway objections when
18 it always involves a central part of the trial of these
19 cases. I put in dust samples. I put in experiments dealing
20 with the dust which creates air samples. I call experts to
21 say what all this means, et cetera, et cetera, and if that's
22 now allowed, I'll go a different way to show their product is
23 bad. I'm confident we can show it's bad under any
24 methodology, but we need that, Your Honor. So, my suggestion
25 would be to try to keep with the CMO as opposed to the

1 Dalbert hearing, make them tell me what the issue is, my
2 clients. Don't say back in June of 2005, I said something or
3 I sent a letter as a part of this proceeding now that I've
4 been put on notice at least as last Friday, tell me what the
5 issue is to be tried. If March is the date, so be it. Let's
6 try the traditional or what I think are the real gateway
7 objections in April, as scheduled. We also could get through
8 those, I believe, in April, and let's have a period after
9 that, a reasonable period, to tee up what I would call the
10 injury issue, which is not a gateway, but we'll have a trial
11 on the injury issue, if that's the way we should go on this.
12 Thank you, Your Honor, and I believe I met my ten minutes.

13 THE COURT: Close. Mr. Bernick.

14 MR. BERNICK: Both Mr. Dies and Mr. Speights spent a
15 good deal of time giving their views on what the evidence is
16 comprised of in these cases and what the merits actually turn
17 on, and I think that what's critical is that it's very, very
18 late in the day to be talking about some significantly
19 different structure because an awful lot of time has passed
20 in this case, and we have a record, and we're prepared to
21 proceed, and we have a date to proceed. Your Honor, we
22 reviewed before the break - I think I can actually go back to
23 a brief that we filed at the very beginning of the case, the
24 informational brief, that set out this defense, one of the
25 principal defenses that we have, and it's a defense that

1 deals with their burden of proof, not our burden of proof,
2 they're burden of proof. And what again is missing is the
3 appreciation that we underscored at that time of the fact
4 that this is a federal proceeding subject to the rules of
5 Dalbert. So when you get issues that pertain to risk,
6 hazard, however you want to characterize it, un-safety, cost
7 benefit, whatever, that deals with toxicity, you're talking
8 about Dalbert and you're talking about science and there's a
9 core of sciences that's common to all of these different
10 cases. That's what we flagged at the outset of this case.
11 We then asked for the claim forms. Mr. Speights says, Well,
12 I thought that was statute of limitations. The claim form
13 asks for all kinds of information relating to any sampling
14 that you have, anything that would bear upon the claim, and
15 that was a claims process that ran to completion. They made
16 the claim. We made the objection. They made the response.
17 We're prepared now to litigate. What they apparently want to
18 do is to kind of say, Well, none of that really counts or
19 none of it really counted. It's as if Mr. Speights said,
20 We're staring last Friday and it's up to us to kind of define
21 an issue, and then we'll frame a pretrial process. It's as
22 if none of that counted, that none of the objections, none of
23 the records counted. But it does count, and the record is
24 closed with respect to the objections and responses to those
25 objections, and we are prepared to proceed on motion practice

1 and we are prepared to meet the hearing, and what I think
2 that we really have to do is get back to, in a sense, what
3 concretely we're talking about. We have teed up the issue of
4 can they prove hazard, and if they want to come in later on
5 and say the standard is different in different jurisdictions,
6 they can go ahead and do that. That's an issue of law that
7 Your Honor can take up. What we're going to have presented
8 is the core science that relates to the question of not
9 injury but whether there is liability in the sense that
10 there's a problem with this product at these locations, and
11 they well know, and Mr. Speights just got done talking to you
12 about the fact that they know how to litigate the issue.
13 They can have dust, they can have air, they can have water,
14 whatever it is that they want, they should have presented
15 this. Well we're now going to have a hearing on that in
16 April, and the only real question that they've raised is,
17 should Your Honor go through a process of giving them the
18 benefit of a hearing before trial on admissibility and on
19 methodology, and then should Your Honor give them the benefit
20 of having then a period of time to pass before the trial on
21 the merits? I think that's what this already comes down to.
22 Everybody knows what the underlying science is. They've been
23 through it a ga-zillion times. The question is whether they
24 are entitled to have Your Honor tell them in advance what's
25 going to count in the trial, and, Your Honor, I believe it's

1 very, very late in the day for them to be negotiating on that
2 because that's effectively what they're doing, is they're
3 negotiating, because the fact of the matter is, that we
4 originally proposed having the dust methodology issue ala
5 Armstrong, no issues about what that was, heard in January,
6 and then were going to have - We wanted, actually, to have
7 the hearing in April - excuse me, in March on what was then
8 Phase II, the remaining issues, that we have identified,
9 that's not called estimation anymore, it's called allowance
10 or disallowance, but it's the same issues. They insisted,
11 they insisted, that they were prepared to proceed in March
12 with the dust methodology and in April with the other method
13 - with the other issues that were identified. They insisted
14 upon that. Now, they'll say, Oh, well, that's when it was an
15 estimation. But it's the same evidence. We're all talking
16 about the same things. It's the same objections in the
17 omnibus, in the fifteenth omnibus objection. So, now they
18 all say, Well, we would like to have the methodology heard
19 first and then have a reasonable period of time. They
20 wouldn't be entitled to that in federal court.

21 Methodological issues, Dalbert issues are sometimes heard on
22 the eve of trial, indeed, in a bench trial, Dalbert issues
23 are heard during trial. We just got done with this enormous
24 tobacco case in Washington, D.C. Judge Kessler - there must
25 have been forty different Dalbert motions, and none of them

1 were resolved in advance of trial. They were all held over
2 for trial because it was a bench trial. So, effectively what
3 they want is to say, they don't really want the Dalbert
4 determination. They simply want to have the only thing that
5 they have to do be dust and then to argue that, Well, we'll
6 never have to get to the ultimate hazard issue. We're going
7 to hear the same arguments all over again. So, effectively,
8 Your Honor, this is a request in essence to simply put over
9 the hazard litigation, and this is a central issue. We have
10 got scores of properties where they have no dust sampling.
11 They have no air sampling. They have nothing to demonstrate
12 that there was actually an ambient level of asbestos
13 sufficient to cause any kind of hazard, risk benefit, however
14 you want to name it, there at all. So, they want Your Honor
15 to say, Oh, we're not prepared to go to trial and have that
16 be adjudicated. Well, that's what the record is. Let's go
17 forward and do the adjudication. So if the April date is to
18 hold, it most definitely should include the so-called hazard
19 issues. These are clear issues. They've been teed up and
20 they can be teed up scientifically. This is no different
21 than what happened with respect to ZAI. Remember how we had
22 to go through framing the core issue for ZAI. We have all
23 the same arguments made about how there are variations in
24 law, and yet there was a core issue of science that somehow
25 the parties actually managed to litigate before Your Honor.

1 This is the same thing with respect to monokote III. So the
2 date in April should hold. Now, we suggested, early on, that
3 we use one of the early dates that is in January or in
4 February for the dust method trial. We're still prepared to
5 go forward on that basis, so, we're prepared to agree, and
6 this is, I said this during the break, we're prepared to go
7 forward first with the dust methodology in January or in
8 February. It's an issue that we can take up at that time,
9 and then go forward in April as scheduled with all of the
10 remaining issues. I even expressed some flexibility that
11 says, We'll even give them another 30 days if Your Honor has
12 time in May so that the issues that were going to be heard in
13 April get heard in May, and if you combine those two things,
14 you've got 90 days, I think, between, you know, February -
15 let's see, February, March, April, May - 90 days between.
16 Now if that's not satisfactory, it's for only one reason,
17 which is that they never want to have the second, the
18 downstroke, they never want to have the actual adjudication
19 of the gateway issues, and then they're going to say to Your
20 Honor, don't go forward in May. But Your Honor's going to
21 hold to the schedule, we can build in some time, although,
22 God knows, I don't know where in the rules this comes out,
23 Dalbert is typically determined shortly before or during
24 trial.

25 THE COURT: Well, I think - The Court has the

1 discretion to determine whether the Dalbert issues will be
2 done pretrial or at the trial or during the trial.

3 MR. BERNICK: Right.

4 THE COURT: So, I don't think that's really a
5 concern. It makes sense to me to bifurcate it in this case
6 because it will probably involve a core of different
7 witnesses than the rest of the issues. So, I don't see any
8 problem with doing it on a different date than the actual
9 trial. What about - and I don't know the answers to the
10 question about May dates, Mr. Bernick, so I can't tell you
11 that now, but what about this: What about holding the April
12 dates for everything but the hazard issues. Those dates are
13 scheduled. It's difficult for me to get three days at a
14 time. I've already given you most of my life in the month of
15 June and early part of July, so I probably am not going to be
16 able to give that much time in May. What about doing the
17 non-hazard issues in April and on the statute of limitations
18 and - I've forgotten what the other one was.

19 MR. BERNICK: Product ID.

20 THE COURT: I'm sorry, product ID in April and
21 moving hazard to May.

22 MR. BERNICK: I don't have a - We don't have a
23 problem with that. What we're concerned about is that hazard
24 - we picked the three issues because we picked issues that
25 were - if there's a difference it really makes a difference.

1 What we don't want to see is it slip because we have bodily
2 injury in June, we then have a petition that says, Oh, we're
3 not really ready in May, and it's going to be August and
4 September or -

5 THE COURT: No, I want to get, for my own benefit, I
6 want to get the property damage issues done before we start
7 the personal injury side.

8 MR. BERNICK: Then we're totally satisfied, Your
9 Honor, with slipping the hazard portion of the April issues
10 to May provided that Your Honor has that space in the
11 schedule.

12 THE COURT: How much of the April time frame were
13 you allotting to do the hazard portion?

14 MR. BERNICK: You know, I don't think we actually
15 kind of divided it up. It probably would be fair to say
16 though, that it would have been, you know, I think you'd
17 probably roughly say, half, that is to say - maybe Jim can
18 address the Court on that.

19 MR. RESTIVO: Your Honor, we did not allocate time
20 among the issues. I think we would like to keep the three
21 days you have given us for April, not give up one of those
22 days because we're taking out hazard, and I think the
23 challenge would be if the Court has, I would think, two days
24 in May for hazard, I think the challenge would be to find
25 those two days and let us still have the three in April.

1 THE COURT: Well, I think you should keep the three
2 in April, because if nothing else, we may need a status
3 conference on the personal injury side at some point as
4 you're getting closer to actually starting that, and one of
5 those April dates might be useful for that purpose too. I
6 know we haven't scheduled anything along those lines. I just
7 offer it as a suggestion that sometimes issues may come up
8 and that may be an available day.

9 MR. RESTIVO: I indicate, Your Honor, two days in
10 May. My recollection is the ZAI science proceeding, I think
11 we did two days, or maybe two days and a morning, and it was
12 really all the same type of issues, and we did get that done
13 in two days.

14 THE COURT: You did. I think it was about maybe two
15 or two and a half, but most of the evidence came in by way of
16 declarations and exhibits. You know, your witness testimony
17 was somewhat limited, but I've got shelves of exhibits with
18 respect to that too. So, is that going to be the same
19 process that you'll tee up?

20 MR. RESTIVO: Again, I don't know that we've talked
21 about the process. I think the parties will have to get the
22 evidence in, dependent upon what the Court's schedule is in
23 May.

24 THE COURT: Okay, well, I think I'm not going to be
25 able to give you those dates until I get back to Pittsburgh

1 because we can't get into my calendar, and I don't have any
2 staff in at this hour to be able to call. So, Mr. Speights?

3 MR. SPEIGHTS: Number one - thank you, Your Honor,
4 for working with us on that. Number two, I will be calling
5 live witnesses at the Dalbert hearing. I assure of that,
6 Your Honor.

7 THE COURT: Well, that will be - The Dalbert hearing
8 is in March.

9 MR. SPEIGHTS: Right, and I'm not sure about the
10 next one until we sort of define it. Number three, as I
11 understood what you said, you would move the Dalbert hearing
12 back to February?

13 THE COURT: Well, I think -

14 MR. SPEIGHTS: To give us 90 days?

15 THE COURT: I think -

16 MR. BERNICK: We're prepared to do that, but I don't
17 know - I know Your Honor has reserved days in February. I
18 don't know whether that's something the other side is
19 agreeable to.

20 MR. SPEIGHTS: I was going to say, if that's the
21 case, can we caucus for one minutes, because that would give
22 us more time.

23 THE COURT: Well, here - I may have a personal
24 reason why I may not be able to do the hearings at the end of
25 March, but the problem is, this event may happen at anytime

1 in March, and I don't know as a result when I'm going to have
2 an issue in March, and I'm not free to say anymore until
3 after next Tuesday. So -

4 MR. SPEIGHTS: Well, Your Honor, I was going - I
5 think we're going to suggest February?

6 THE COURT: So, March, if we can avoid March maybe -

7 MR. DIES: Your Honor, we were ready to do it in
8 January at one point, it was an estimation.

9 THE COURT: I'm sorry, Mr. Dies, I can't hear you.

10 MR. DIES: February, Your Honor, would most likely
11 be the most appropriate time for the claimants.

12 THE COURT: Okay, you have dates, Mr. Restivo
13 already in February?

14 MR. RESTIVO: Your Honor, I believe your staff was
15 saving dates in February, I don't know what they were, but I
16 know at the last hearing you did not give them up. You kept
17 them for this case.

18 MR. BAENA: I've got them on my blackberry in the
19 locker if you want me to go get them.

20 THE COURT: Yeah, please. If the guard needs to -

21 MR. BERNICK: Well, Your Honor, if we can - I'm sure
22 that we can, with all the resources here figure that out, but
23 the idea is we would then do - February would be the
24 methodology - dust methodology.

25 THE COURT: Right.

1 MR. BERNICK: And then April would be the two
2 gateway issues, the statute of limitations and product ID,
3 and then May we would do hazard.

4 THE COURT: That's right. That's the scheme that I
5 will try to implement, but I need to go back to Pittsburgh to
6 be able to be able to implement, see what I can work out.

7 MR. BERNICK: That's fine, and then I guess that
8 with respect to the text of the notice, the text of the CMO,
9 would those matters that are basically now under submission
10 to the Court, and Your Honor intends to go through that? I
11 mean, what would you prefer - how would you prefer that that
12 be handled?

13 THE COURT: All right. Well, I started to get into
14 that issue several hours ago, and then I got sidetracked, so,
15 let me take one look at this for a minute.

16 MR. BERNICK: To be clear, there was some reference
17 made to the fact that we weren't giving people notice. The
18 reason there were two lists, Your Honor, is very clear in the
19 notice. The first list is a list of all claimants, and the
20 idea is that all claimants would get the notice.

21 THE COURT: Well, I think what you can do rather
22 than attaching a list of all claimants to the notice is serve
23 them all and attach it to the certificate of service. Make a
24 representation that all claimants are being served, but, you
25 know, if your name appears on the list that's attached, which

1 I guess at that point would be Exhibit A, then your case is
2 going to trial on these dates.

3 MR. BERNICK: Right.

4 THE COURT: And I think that would make it more
5 clear. With respect to the methodology, I think we still
6 need this trial, Mr. Baena, whether it's for purposes of
7 allowance, disallowance, or whether it's for purposes of
8 estimation, and because I'm not clear at this point what's
9 going to be estimated, frankly, but I think we still do need
10 to know acceptable methods of proof, and whether dust
11 sampling for the objections the debtor has raised will be
12 one. I agree, however, that seems to be - on the Dalbert
13 issue seems to be an issue as to whether or not it's the only
14 evidence that a claimant has is dust sampling, you're going
15 to be able to come forward with evidence. So, maybe we need
16 to make it clear that the methodology will determine whether
17 dust sampling - that the methodology trial is intended to
18 determine whether the dust sampling will or will not be an
19 allowed method of proof.

20 MR. BERNICK: Yes, well, I mean, this is not any
21 kind of mystery. First of all, this is all going to lawyers.
22 Secondly, I mean, most lawyers now know that the effect of
23 Dalbert is that if your evidence is stricken, you're then
24 subject to a motion for summary judgment or you're subject to
25 the disallowance of the claim, but we can certainly spell

1 that out.

2 THE COURT: I think it should be spelled out because
3 I agree with you that the lawyers will understand it, but to
4 the extent - and I'm not sure that there are any claimants
5 left who have not filed claims through lawyers in this
6 process, but nonetheless, I think it may be better spelled
7 out. So -

8 MR. BERNICK: We'll be happy to do that.

9 THE COURT: - let me make the following rulings,
10 and then, please, let's see if we can just memorialize this
11 with no more changes. Number one, the notice is to go to all
12 entities that the debtor intends to prosecute a claim
13 against, an objection to claim against, on any of the trial
14 dates that we have just discussed, which for purposes of this
15 record right now are either the March or April dates. Those
16 dates may change, but those are the body of objections to
17 claims I'm talking about. Is anybody unclear about that?
18 Okay. With respect to that body of claims, the Dalbert
19 hearing will take place first, whatever those dates are,
20 hopefully in February. The April hearing will be limited to
21 product ID and statute of limitations, and the May hearing
22 will constitute hazard. To the extent, Mr. Speights, that
23 your clients are not clear as to specifically what - how the
24 debtor is going to frame those issues, file a motion if the
25 debtors - or take discovery, if you need some assistance

1 along those lines, then it will be opened up, but I think the
2 appropriate way to do it is from contention interrogatories
3 or however else you choose to get that information, so
4 discovery is open. Mr. Baena, you raised the issue of the
5 inconsistency in this order in terms of the fact that
6 paragraph (5), I think, I'm not sure what the modified
7 paragraph is, says that Phase I estimation - or Phase I
8 estimations previously addressed are not going forward. I
9 think the paragraph needs to be restated to say that the
10 Phase I trial is going to deal with the debtor's objections
11 to dust sampling, and the hearings in April will cover
12 product ID and statute of limitations issues and the May
13 hearings will cover whatever other hazard issues.

14 MR. BERNICK: The second paragraph that he referred
15 to was the negative paragraph and the reason it reads that
16 way is Phase I, Phase II estimations, and that was the reason
17 why we thought that they would want that, and frankly, we
18 don't care.

19 THE COURT: Well, why don't we simply vacate any
20 other orders that were out there with respect to the
21 scheduling so that it's clear that to the extent that words
22 were used and as other orders, they don't have any meaning
23 anymore, this is the schedule and the way we're going forward
24 with it.

25 MR. BERNICK: That's fine.

1 THE COURT: Okay, now, Mr. Baena, you raised the
2 issue about giving other people an opportunity to
3 participate. I think the way I have to do that at this point
4 is to say, This is the schedule the Court's setting up. If
5 someone has an objection to it, you have to file it I guess
6 in time to be heard in the September hearing. Now, I don't
7 know what that objection date is. That may have passed
8 already.

9 MS. BAER: The motion date is today, Your Honor.
10 So, the objection would be about 14 days.

11 THE COURT: Okay. Well that should - I think the
12 objection period - Can I assume that you folks are going to
13 work out an order for this this time. Since I'm giving you
14 specific rulings, are you going to be able to work out an
15 order and get it filed by, let's say, Wednesday? If not,
16 then I want your different versions all filed by Wednesday,
17 from all of you, and I'll piece them together.

18 MR. BAENA: Could you make it . . . (microphone not
19 recording), please we're going to be traveling tomorrow.

20 THE COURT: Sure, Thursday's fine. August 24th -
21 Okay, I will get you an order by not later than Monday the
22 28th, but hopefully on the 25th, so I want everything filed by
23 August the 24th at 2 p.m. so that I have an opportunity to
24 work on it and hopefully get it back to the debtors. So the
25 debtor is to make service by August the 29th. I will extend

1 the objection period to September the 14th. Your preliminary
2 binders are due the 15th; correct? Two Fridays before the
3 hearing.

4 MR. O'NEILL: Yes, Your Honor.

5 THE COURT: Okay. So, the preliminary binders are
6 still due the 15th. The objection period can be September 14th
7 at 4 p.m., and if there are objections, they will be heard,
8 those specific objections will be heard on the September
9 omnibus hearing date. If there are no objections, that order
10 is final as to all parties, and the order will stay final as
11 to anyone who doesn't object. Now, the gentlemen who are
12 here, Mr. Speights and Mr. Dies, I expect that as your
13 clients there isn't going to be an issue about these dates,
14 that these dates are now going to be worked out in sufficient
15 time that you folks, for the largest body of claims, are not
16 going to have an issue. If you've got a problem with that,
17 tell me now.

18 MR. SPEIGHTS: I understand, Your Honor. I'm
19 prepared to go forward like you've said.

20 THE COURT: All right, Mr. Speights indicated he's
21 prepared to go forward. Mr. Dies?

22 MR. DIES: Your Honor, I understand, and I'm
23 prepared and I'll be advising our clients. I'm not attorney
24 of record for the Louisiana claims. I'm a little concerned
25 about some of that because some of those attorneys you can't

1 even really communicate with because they've relocated. So,
2 those claims, I just want to tell the Court, that I need to
3 really try to talk to those folks because I'm not the
4 attorney of record.

5 THE COURT: All right. I'm only speaking at this
6 point for your own individual clients, not for people you
7 don't represent.

8 MR. DIES: Yes, right.

9 THE COURT: Okay.

10 MR. BERNICK: Your Honor, I'm a little bit concerned
11 because the whole idea that we had of limiting the folks that
12 we're dealing with, if what we're going to have is a bunch of
13 people now come in and have the same processes saying all or
14 none of this is workable, and, you know, I don't understand
15 what this means, et cetera, et cetera -

16 THE COURT: Just because I'm giving somebody an
17 opportunity to object doesn't mean I'm going to buy it and by
18 the same token they may very well have a reason why it's
19 legitimate, Mr. Bernick, and they're not here.

20 MR. BERNICK: No, I understand, and with respect to
21 the Louisiana folks, I guess we'll pursue and try to find
22 out, but I do know that in the objections, the responses to
23 the objections that we made with respect to those Louisiana
24 folks, I believe that Mr. Dies name is on the pleadings as
25 being special counsel, every single one. So, if they're

1 going to come in and say that they didn't know what was going
2 on, I mean, it's going to raise a real issue of consequence.
3 Those 99 Louisiana claimants, Your Honor, they have a
4 significant chunk of claims, and we think that they are very
5 amenable to being dismissed in this process, and to learn now
6 that Mr. Dies, in fact, does not represent them, I think
7 we're going to want to make inquiry about what it is that
8 they've known about this proceeding. To have them come in
9 and say, Oh, gee, it's a surprise to me. We would have to
10 take that at face value, and I think this is a sufficiently
11 important matter, that there ought to be something more said.

12 THE COURT: If you're special counsel, Mr. Dies,
13 don't you represent them?

14 MR. DIES: Well, I'm co-counsel, national counsel.
15 I didn't file the claims, they did. I assisted them in
16 filing responses to the objections, but I think that the
17 answer to that is, the way the contract reads, it goes back
18 almost 20 years, I don't have any responsibility for issues
19 of Louisiana law and issues related to filing of the claims.
20 So, what I'm saying is, that I will make every effort to make
21 sure they know about this, but in terms of whether they may
22 come up and say, Well, we have a special reason here. I'm
23 just saying that I didn't file the claims, and I've never
24 seen some of the claims. The objections, the responses to
25 the objections we assisted with and that's all we did.

1 THE COURT: All right, well, I'll take a look and
2 see what happens when they come in. I want to make it very
3 clear, I expect that this is going to be sufficient due
4 process for people to get ready to go for these hearings, and
5 it's going to take a very special reason to convince me
6 otherwise, but there may be special reasons, and I'm giving
7 people an opportunity, but it's not going to be because they
8 didn't now about this until August 24th. That will not be a
9 sufficient reason.

10 MR. DIES: Your Honor, let me just say also, I don't
11 think there will be a problem.

12 THE COURT: Okay.

13 MR. DIES: But, a lot of these people had their
14 lives misplaced and their buildings ruined and their homes
15 gone, and for them, communication issues have been very
16 difficult. For example, I don't have a lot of claims they
17 filed, Your Honor. We did the best we could, but, so, I'm
18 just saying there are special circumstances with these folks
19 -

20 THE COURT: And I appreciate that -

21 MR. DIES: They may come forward, but I'll do my
22 best, and I don't think there's a problem.

23 THE COURT: Okay.

24 MR. BERNICK: That's fine, we'll accept that. You
25 know, these are basically parish school boards, these are

1 basically school districts and boards, so they're talking
2 about school buildings. They are not people's personal
3 residence.

4 THE COURT: Well, I know, but the schools may have
5 disappeared or their residences may have disappeared.

6 MR. BERNICK: If the schools have disappeared then I
7 think that would be very important to know because it may be
8 that there's, you know, what's the claim that's left in the
9 case.

10 THE COURT: That's exactly right, so you may want to
11 know that fact, but in any event, the schedule is, the orders
12 are to be by me - the order proposed or pleural orders,
13 August 24th at 2, by September 14th at noon, objections are to
14 be filed, they're to be in my preliminary binder on the 15th,
15 and if there are any objections I'll hear them September 25th
16 at the omnibus hearing. If there are no objections, everyone
17 is going to be bound by that order. Mr. Speights?

18 MR. SPEIGHTS: Two things, Your Honor, two new
19 things. In the proposed notice of deadlines that is
20 currently in place or had been offered, it says, All parties
21 reserve the right - this is paragraph (6) - All parties
22 reserve the right to file additional summary judgment motions
23 after April 23. The paragraph itself talks about the
24 debtor's intention to file motions for summary judgment. I
25 want to make sure that that provision does not preclude

1 claimants from filing motions for summary judgment whenever
2 they feel appropriate.

3 THE COURT: All parties are all parties?

4 MR. SPEIGHTS: Right, well, that, no, this is after
5 April 23. I don't want to have to wait till after April 23
6 to file motions for summary judgment.

7 MR. BERNICK: It reserves the right to. All they're
8 saying -

9 MR. SPEIGHTS: All parties reserve the right to file
10 additional summary judgment motions after April 23. Fine, if
11 we agree, we don't need to argue about it.

12 MR. BERNICK: We can have a conversation over the
13 telephone for these things.

14 MR. SPEIGHTS: Maybe.

15 THE COURT: I think it would be a good idea to set
16 dates by which summary judgment motions have to be filed near
17 the end of the discovery period for purposes of the issues
18 that are set. With respect to reserving something on some
19 other issue after the April hearings, fine, but with respect
20 to, you know, whatever the discovery has produced that you
21 think does not require an evidentiary hearing, I would like
22 to know about those summary judgment motions, if they're
23 going to be any, in advance. So, fix the dates. Put the
24 dates into the order. Make it a reasonable time in advance
25 of the March hearing dates so that if they're on the Dalbert

1 issues and in advance of the -

2 MR. SPEIGHTS: Advance of the February if you get
3 February.

4 THE COURT: Right, or in advance of the April date
5 if they're a product ID or statute of limitations and in
6 advance of May if they're hazard issues. So you can key the
7 summary judgment dates to, you know - I'm not ruling, just
8 suggesting, 30 days before the trial so that everything can
9 get filed if need be.

10 MR. SPEIGHTS: Thank you, Your Honor.

11 THE COURT: Okay.

12 MR. SPEIGHTS: The only other thing, and frankly I
13 don't know the answer to it, there is an exhibit with all the
14 discovery deadlines, and I don't know what the change in
15 dates does to that exhibit. I'm happy to speak with Mr.
16 Bernick about it and see if they need to be adjusted. I
17 don't know whether they need to be adjusted.

18 MR. BERNICK: Well, I took Your Honor's direction to
19 us to mean that we have to work on the order and basically
20 come up, if we can, with an agreement, and if we can't to
21 make a submission to the Court by the dates that were
22 indicated. I hope an expectation is that we wouldn't have to
23 trouble the Court with some of those scheduling issues.

24 THE COURT: Okay. Let's - You folks ought to be -
25 Let me put it this way. I am going to look very suspect at

1 any fees that anybody submits with respect to trying to deal
2 with this issue if you don't give me a consensual order.
3 Now, I know, Mr. Speights, I don't rule on your fees, but I
4 hope as a gentleman and an officer of the Court, that you
5 will take that to heart and do your best as well.

6 MR. SPEIGHTS: Do I get a bonus if we could get you
7 something, Your Honor?

8 THE COURT: Yes, sir.

9 MR. O'NEILL: Just one point on dates. For the
10 September 25th hearing, our final agenda and binders would be
11 due to you on the 18th, and our preliminary would be due on
12 the 11th.

13 THE COURT: I'll take this in the final binder then.

14 MR. O'NEILL: Okay, final.

15 THE COURT: These objections only.

16 MR. O'NEILL: Great, thank you.

17 MR. BAENA: If I may. Your Honor, could we reserve
18 the right to include a letter from the Committee in the
19 service of this order?

20 THE COURT: To do what?

21 MR. BAENA: Prepare a letter from the Committee to
22 claimants in, you know, a less formal way describing what's
23 happened here?

24 THE COURT: Sure.

25 MR. BERNICK: Your Honor, if they want to send a

1 letter to all of the claimants, they can do that. If it's
2 attached to or accompanies any orders of the Court the
3 suggestion, of course, will be that somehow it has been
4 approved by the Court, and all we're going to do when we go
5 down this road is introduce another element that we're going
6 to be arguing about and then thinking about what the order
7 should say in order to balance or clarify anything they want
8 to get sent. If they want to communicate with their
9 constituency, they should be doing that. Nothing stops them
10 from doing it. Let them write their own letter. I really
11 don't care what they letter says. It's up to them.

12 MR. BAENA: I was trying to save some money, Judge,
13 that's all.

14 THE COURT: Apparently the debtor doesn't want to
15 save it, and since there are 593 letters that would have to
16 go out at most, 593 times 37 cents isn't going to break this
17 case. So, send the letters on your own.

18 MR. BAENA: Okay.

19 MR. BERNICK: Your Honor, our proposal for how to
20 proceed next, remember, there was the late claims issue or
21 I'll just say the authority issue with respect to Mr.
22 Speights. There was the Anderson Memorial report on the
23 notice. There was then the bar date for PI, and the PI CMO,
24 which are pretty much tied together. What I would propose is
25 that although it's an arduous process always, it would

1 probably be most useful if we turn now to the bar date and
2 the CMO for personal injury and then I think that we can
3 resolve - that will resolve the principal element to the
4 personal injury. We have to make a report on the
5 questionnaires, that won't take long, and then everybody else
6 can leave if they want and we would just - I think you have
7 matters only relating to Mr. Speights left at the end of the
8 calendar, so, if it's -

9 THE COURT: That's fine.

10 MR. BERNICK: Okay. Let me talk about - What? The
11 bar date.

12 THE COURT: So this is agenda -

13 MR. BERNICK: This is agenda item number -

14 THE COURT: Ten?

15 MR. BERNICK: Ten, 8, 9 - 10.

16 THE COURT: Okay. This is actually the one I
17 thought it was in the other one. I apologize. This is
18 actually the proposed order that I have some concern about
19 the language that I don't think was taken out in the
20 amendments that were submitted last week. There is very
21 bolded and in capital letters this sentence: The fact that
22 you've received this notices does not mean that you have a
23 non-settled pre-petition asbestos PI claim or a settled pre-
24 petition asbestos PI claim or that the debtors or the Court
25 believe you have either of such claims. Frankly, I don't

1 think that's appropriate in a bar date notice. I mean,
2 you're telling people to file their claims. Of course it's
3 not a given that they have one, but they think they do, and
4 if the debtor doesn't the debtor will object, but the Court
5 doesn't have any opinion about whether they do or don't.

6 MR. BERNICK: I'm sorry, where does that -

7 THE COURT: It's on - The version I'm looking at is
8 the one that was filed on August the 18th at Docket No. 13012.
9 It's on page 4 of the notice.

10 MR. BERNICK: Yeah, I just - the notice. Yeah - If
11 Your Honor doesn't like it, out it goes.

12 THE COURT: Okay. Then let's look on page 6 at
13 Roman Numeral IX, the effect of not properly filing an
14 asbestos PI proof of claim -

15 MR. BERNICK: The effect, yeah. I'm with you.

16 THE COURT: Okay. That's fine. I thought there was
17 something about the form as opposed to the proof of claim in
18 here. Apparently, that's not the case. There's another one,
19 though. Oh, okay, it's on page 3 under Roman Numeral III,
20 procedure for non-settled pre-petition asbestos PI claims.

21 MR. BERNICK: Yeah.

22 THE COURT: The bolded paragraph says, If you're
23 asserting a non-settled pre-petition asbestos PI claim and
24 you previously returned the questionnaire, you still must
25 file an asbestos PI proof of claim. Also, filing an asbestos

1 PI proof of claim does not excuse you from completing and
2 returning the questionnaire. If you file an asbestos PI
3 proof of claim but did not return the questionnaire, I'm not
4 sure whether you meant the file there to be past tense, if
5 you filed an asbestos claim but did not return -

6 MR. BERNICK: Yes, yes, that's correct.

7 THE COURT: - the questionnaire, then the debtors
8 reserve these rights.

9 MR. BERNICK: Right.

10 THE COURT: Okay, then, what if I already filed a
11 proof of claim in Roman Numeral IV. You must file an
12 asbestos PI proof of claim even if you previously filed a
13 proof of claim regarding your non-settled pre-petition
14 asbestos PI claim or your settled pre-petition asbestos -
15 Why? Why do they need to file it again?

16 MR. BERNICK: Let's see. You must file an asbestos
17 PI proof of claim even if you previously filed a proof of
18 claim regarding your non-settled pre-petition claim or your
19 settled pre-petition asbestos - Yeah, well, certainly as to
20 the latter, that is a settled pre-petition PI asbestos claim
21 on Form 10, that's not sufficient because Form 10 has much
22 less, requires much less than this one does. If somebody has
23 a settled claim, even though they filed a Form 10 before,
24 they still have to file this form because Your Honor
25 indicated you wanted information sufficient for us to be able

1 to assess whether their claim was settled or not.

2 THE COURT: Okay, well, if that's the case then, can
3 you make this say something like, you must file an asbestos
4 PI proof of claim on the form attached.

5 MR. BERNICK: Yes, that's fine.

6 THE COURT: Or something so that - This language is
7 not, I think, very clear.

8 MR. BERNICK: So you must file a proof of claim on
9 this form, using this form, even if you've previously filed a
10 proof of claim -

11 THE COURT: That complied with official Form 10.

12 MR. BERNICK: Form 10, yeah, and I think that's
13 really the simplest way to put it. So when we're speaking to
14 the people who filed previously on Form 10, and we're saying,
15 you've got to file your claim using this form.

16 THE COURT: Right.

17 MR. BERNICK: Period. Without regard to what their
18 status might be.

19 THE COURT: Right.

20 MR. BERNICK: Yeah, that's fine.

21 THE COURT: Okay. What other objections or issues
22 are not resolved between the parties?

23 MR. BERNICK: I suppose that's a question that could
24 fairly be addressed to Mr. Lockwood first, but let me try to
25 put - I think there are basically three - two or three

1 issues, and then I want to make sure that we talk through the
2 process so that Your Honor understands where we've come since
3 the last discussion we had on this. The form, as you know,
4 from having looked at it distinguishes between non-settled
5 and settled claims, and the reason for that is the reason
6 that we talked about last time, which is that with respect to
7 the settled claims, they enjoy different status. So you then
8 get to the question of, Well, how do you define settled
9 claims? And settled claims are defined at page 2 of the
10 order and at page 2 of the order it says, For purposes of
11 this order and bar date, the term settled pre-petition
12 asbestos claims shall be defined, and then it goes on - and
13 then gives the requirements. And such claim against one or
14 more debtors, one, was filed in the Court as its lawsuit
15 prior to April 2. Two is the subject to a settlement
16 agreement that - and we then have A through D. So the
17 definition of what a settlement constitutes really is
18 comprised by A through D. I think that most of them are not
19 at issue. Three of them are not at issue. That is that it
20 is entered into and memorialized in writing between the
21 holder and one or more of the debtors prior to April 2. B is
22 unenforceable under applicable non-bankruptcy law, and then D
23 has not been fully paid or satisfied by any of the debtors.
24 It is C, provides for a release that apparently is at issue,
25 that is, whether there has to be an actual release for there

1 to be a binding settlement. Now, we went through all this in
2 connection with the Babcock & Wilcox case, and the outcome
3 there was that there did have to be a release -

4 THE COURT: Did?

5 MR. BERNICK: Did.

6 THE COURT: Did.

7 MR. BERNICK: But in order not to seek to litigate
8 the issue up front here, we deliberately used the words
9 "provides for". That is to say, all we're really saying is
10 that unless the settlement provides, saying that there is
11 going to be a release, it's not a settlement. If the claim
12 is not released you can't say it's a settlement. When that
13 release is given or received, is not addressed here. It
14 simply says that the writing has to provide for a settlement,
15 that the writing or release. If the writing doesn't provide
16 for the release, that's not a settlement. So, we tried to
17 avoid the Court coming to grips with, you know, when is the
18 piece of paper actually received. We might litigate that
19 later on, but all we're saying here is that it's not a
20 settlement if it doesn't provide for a release. So we tried
21 to loosen the language there to capture the concept of there
22 must be a release but avoid timing issues for receipt of
23 release issues which may be what animates the concerns of the
24 Committee. So that's one issue that we have. The second two
25 issues relate to the process, and they're not insignificant.

1 The first part of the process is, who fills out this claim
2 form, and we believe it was clear from what Your Honor said
3 last time, that everybody that's got a claim has got to fill
4 one out. You want everybody who's going to have a claim to
5 fill one out, and I think that's been resolved, and these
6 papers are drafted to contemplate that everybody will have to
7 fill one out as indicated, in fact, by the language that Your
8 Honor referred to. The second issue is a very important one,
9 and Your Honor's going to have to resolve which is the
10 linkage between people who assert that their claim is settled
11 on the one hand, and the obligation to fill out the
12 questionnaire on the other, and we had some discussion about
13 this before, but clearly, from our point of view, people who
14 assert that they have a settlement and our records do not
15 reflect that they do have a settlement, the other side would
16 have them not have to fill out the questionnaire until Your
17 Honor determines that they fall into the category of being a
18 settled claim. In fact, what they're actually suggesting is
19 that it first be mediated, then Your Honor determines whether
20 they fall into the category of settled claims. And, Your
21 Honor, from our point of view, that just is going to tank
22 this process. There's no question but that we have to know
23 who has a settled claim, because if people merely assert that
24 they have a settled claim when they don't, it will blow the
25 same data hole in our claim's spectrum that we would have had

1 if we didn't have a bar date.

2 THE COURT: But if you think - If someone asserts
3 that there is settled claim, and you don't have a record of
4 it, aren't you going to file an objection to it saying we
5 don't have a record that you settled?

6 MR. BERNICK: Yes, that's currently the case. In
7 other words - Let me just put it up here very quickly to see
8 what the - there's a sequence point. We contemplate that
9 people who have settled - who believe they have settled
10 claims actually have an earlier bar date. I think it's
11 October 15 or something like that. That is, if the claimant
12 says it's a settled claim, it's asserted to be settled, they
13 have to give us their form then, together with the
14 documentation. We then have a period of time, I think it's a
15 couple of weeks - I'm sorry, what? Twenty-one days, so it's
16 sometime in November? Whatever it is, we then say, yes or
17 no, and there was a concern that was raised about whether we
18 would have to say yes if it was yes, and we're agreeable that
19 if we think it was a settled claim, we will affirm that at
20 the same time that we would have been obliged to tell them if
21 we didn't think it was settled.

22 THE COURT: All right.

23 MR. BERNICK: So the same date, we'll give them the
24 answer. So, we'll say, no, and fill out the questionnaire.
25 We would then put it back to them, they could satisfy that.

1 They could satisfy our concern within some period of time,
2 but the next step would be that there would be, you know, an
3 objection process and then some kind of hearing. So, once we
4 know that their claim doesn't meet our records of being a
5 settlement, yes, we can go forward and make an objection and
6 have an adjudication of whether their settlement satisfies
7 the standards or not, and we're proposing that that be done.
8 And that could actually be in like December and in January.
9 Now, I will tell you, Your Honor, we went through this in
10 Babcock. We started out with 48,000 people who said their
11 claims were settled, and by the time I think before the
12 process was terminated because a consensual plan was reached,
13 I think upwards of 30,000 of them had been disallowed, and we
14 were probably on the way to about 40,000 of them ultimately
15 being disallowed.

16 THE COURT: Disallowed as settled claims.

17 MR. BERNICK: Disallowed as settled claims; correct.

18 And what we found is that very quickly, as the Court
19 announced the criteria for all that settled, all kinds of
20 claims were withdrawn. It dissolved very, very quickly. It
21 actually took very little court time. So we think that as
22 soon as in this process Your Honor articulates what the real
23 criteria for settlement are, all this is going to become
24 pretty simple. The key thing is this: that while we're happy
25 to go forward and have that issue resolved as triggered by

1 our saying yes or no on whether we believe it's settled, we
2 do have to get the questionnaires filled out, and we can't
3 have filling out the questionnaires await Your Honor's
4 ultimate determination about whether the claim is settled or
5 not. Why? Because if we don't get this information, we're
6 left with exactly that same big data hole. People don't want
7 to fill out the questionnaire. So of course they're going to
8 say, Oh, well, the claim is a settled claim.

9 THE COURT: Well, why don't we define the criteria
10 for settled claims in advance. I mean if the issue is a
11 release, what does the debtor's settlement agreement with the
12 parties say? You have to have had a full payment and release
13 before you have a settled claim?

14 MR. BERNICK: We didn't pay claims until we had a
15 release, and it was also Babcock's practice is that they
16 didn't pay until they had a release. But, Your Honor -

17 THE COURT: So, if you have a release and they
18 didn't get paid then they're settled but unpaid.

19 MR. BERNICK: They're settled but unpaid. We're
20 happy to deal with those claims. What we have a problem with
21 is, if they say, Well, here's the settlement, it's in
22 writing, and it's kind of - they deal in principal but there
23 hasn't been any kind of release received. There's no checks
24 that's been cut, and there may be other things that are built
25 into it that make it essentially not quite yet a settled

1 claim. If they can come forward and say, Here's a document
2 that says, John Doe's claim is settled for \$10,000 and upon
3 receipt of a check - upon receipt of the attached release,
4 the check will be cut. I'd have to go back to my people to
5 find out whether they would regard that as a settled claim
6 for purposes of their database, but that is an agreement that
7 provides for the release. That's why we use the language
8 that we did.

9 THE COURT: Well, if there was a release that has
10 been given to the debtor, why don't you just ask for a copy
11 of the release. Would providing a copy of the release be a
12 problem?

13 MR. LOCKWOOD: Your Honor -

14 MR. BERNICK: What that - Well -

15 MR. LOCKWOOD: Your Honor. My compatriot, Mr.
16 Liesmer is going to present the argument on this, but I was
17 involved in the B&W case, and he wasn't so I feel compelled
18 to say certain things. First, there was a lot of litigation
19 in the B&W case over what was a settled and not a settled
20 claim because the issue, as a matter of bankruptcy law, is,
21 number one, to determine if you have a settled claim you look
22 to state law, and state law may or may not require a writing.
23 For example, if Mr. Bernick and I in a tort case get up in
24 front of the judge on the first day of trial and say, Judge,
25 we've agreed to settle the case for \$10,000 and the Judge

1 says, Are you authorized by your clients to do that, and we
2 say, yes, and we're not lying, that's a settled claim under
3 the law of a lot of states even though it doesn't have a
4 writing signed by the plaintiffs to evidence it, and it
5 doesn't - and the statement of the settlement didn't say
6 anything about a release. It may well be that the effect of
7 that is to give a release. It may well be that there's - you
8 pay for it later on and you get a release, but the question -

9 THE COURT: I think -

10 MR. LOCKWOOD: - is whether, excuse me - the
11 question -

12 THE COURT: If that's the issue, Mr. Lockwood,
13 that's an easy one. There is actually a writing. It happens
14 to be a transcript. So attach a copy of the transcript and
15 then you've got a writing and that's the end of it.

16 MR. LOCKWOOD: My point simply is, Your Honor, that
17 a settlement is a form of contract, and Your Honor, as a
18 bankruptcy judge, has undoubtedly seen much litigation over
19 the years among parties as to whether they did or did not
20 enter into a binding contract. It is not at all clear, as
21 Mr. Bernick so glibly asserts that you cannot have an oral
22 contract to settle a case, and the only point I'm trying to
23 make here is that we have not disputed in our papers the
24 requirement that the finding - that the settlement be binding
25 and enforceable, and that will be a matter of binding and

1 enforceable under whatever state law applies, but what Mr.
2 Bernick is attempting to do, and Your Honor has been
3 exhibiting some sympathy for, is for Your Honor to decide
4 today in the absence of any claimant who says his claim is
5 settled and where there's a dispute from the debtor, what the
6 requirements would be under the laws of 50 states to
7 determine whether or not a claimant had or had not entered
8 into a binding settlement.

9 THE COURT: No, Mr. Lockwood, I don't want to go
10 there. I'm going to make this real easy. If there is a
11 writing, even if it's a court order or a transcript or
12 whatever, that shows that there's been a settlement, it's to
13 be attached. If it's an oral -

14 MR. LOCKWOOD: But there's no -

15 THE COURT: If it's an oral agreement of some sort,
16 that's what the claimant relies on, the claimant can say I
17 had an oral agreement, and here's who is was with, and
18 whatever facts they have but they're to fill out the
19 questionnaire, and that's a good compromise. That way, if
20 it's in writing it should be beyond dispute. If it's an oral
21 issue then the parties can argue whether or not it is settled
22 later, but at least for purposes of getting through this
23 process, the debtor will have what it contends it needs and
24 there is no great prejudice to the parties in having to fill
25 out that form if they allege that they've got an oral

1 contract to settle. So, that's my ruling, that's it. That's
2 my ruling.

3 MR. LOCKWOOD: Let me turn the lectern over to Mr.
4 Liesmer who will respond on some of the other points.

5 THE COURT: All right.

6 MR. LOCKWOOD: Maybe he'll do better than I did.

7 THE COURT: Mr. Liesmer.

8 MR. LIESMER: Jeffrey Liesmer appearing on behalf of
9 the Asbestos Claimants Committee. Your Honor, in light of
10 your comments just now, may I suggest, because part of the
11 dispute that we're having with the debtors, and we were able
12 to narrow a lot of issues down over the past couple of weeks,
13 but one of the issues we're having with the debtor is
14 defining a settled claim as being memorialized in writing,
15 and I had a concern with the word "memorialized" because it
16 suggests that there has to be this, you know, beautiful
17 document with the boilerplate that says Settlement Agreement
18 at the top of it.

19 THE COURT: Fine, say if it's in writing, period.

20 MR. LIESMER: Evidenced, in writing - I was going to
21 suggest evidenced in writing.

22 MR. BERNICK: Or if it's contemporaneous.

23 THE COURT: No, if there is evidence in writing,
24 they can attach it, but it has to be attached. If it's a
25 transcript, fine. If it's a court order, fine. If it's a

1 settlement agreement, fine. If it's in writing, they're to
2 attach it, and that will be sufficient at this point in time
3 to avoid filling out the questionnaire until the debtor has a
4 chance to verify that the records are what they are, but if
5 it's an oral agreement, the questionnaires are to be
6 submitted.

7 MR. BERNICK: Your Honor, that's fine. I thought
8 that the ruling was a good compromise, I'm not sure what just
9 happened in the following way. Sometimes a problem that you
10 have is that these claims get resolved in groups. People do
11 so-called inventory deals. It just the way the world works.

12 THE COURT: Yes.

13 MR. BERNICK: And you can have things that are in
14 writing that will be represented to be settlements on an
15 inventory basis, like, we will settle 10,000 claims for X
16 dollars.

17 THE COURT: That's not a settlement if you don't
18 have a release; is it? I mean if the money -

19 MR. BERNICK: So that's why, when we go back to our
20 order, what we said was very specific because it has to be an
21 agreement between the debtor and the plaintiff. That is, it
22 has to be specific to the claimant in the case.

23 THE COURT: Well, sometimes the mass agreements also
24 say we have 10,000 claimants and then the list is submitted
25 at a certain point that show the 10,000 claimants.

1 MR. BERNICK: Well, see, that's -

2 THE COURT: In most instances the debtor has the
3 right to take a look at those claims before they are paid and
4 doesn't have to pay till the release is in, which is one
5 reason why it's a good idea to have a release.

6 MR. BERNICK: That's why we've included release, but
7 the key thing is, you have to have an agreement that is
8 reduced to a dollar number for a plaintiff that is the
9 settlement, the price element of their settlement, and it has
10 to be acknowledge by them. It can't just be the law firm
11 saying, Here's what I would like to do and there has to be
12 the release. So, that's what is in our definition, and I,
13 you know, the idea that - the bright line between verbal and
14 non-verbal is pretty clear, but when you get to writings, we
15 don't want to have to go through the process of then coming
16 back to Your Honor and saying, Well, they've given us a
17 correspondence from their correspondence files about a course
18 of conduct that gave rise to an expectation -

19 THE COURT: No. Look, this is getting way too far
20 afield. It is a contract, an expectation that you will come
21 to an agreement is not a contract that indicates a
22 settlement. It's either a settlement or it isn't, and folks,
23 these are going to be real bright lined standards that this
24 Court employs if it's something in writing, it's something
25 that either was or wasn't settled, but it does not mean that

1 it's not settled just because the specific claimant did not
2 agree or did not - pardon me, sign off on a settlement
3 document if the debtor has a letter - Mr. Lockwood, I'm going
4 to pick on you since you don't have a dog in this fight.
5 Let's say Mr. Lockwood has 500 plaintiffs and the debtor has
6 a letter that goes to Mr. Lockwood that says we've agreed
7 that we'll settle your 500 claims for \$500,000, and what Mr.
8 Lockwood has to do is submit the documents based on his 500
9 people along with the releases in order for the debtor to
10 issue the check, and that's evidence in writing that there
11 was in fact a settlement. Whether or not the releases are
12 there, you know, I don't know at this point.

13 MR. BERNICK: But the releases become key. Unless
14 the releases are there, the clients haven't signed on.

15 THE COURT: That's fine.

16 MR. BERNICK: That would be a contract with a
17 client.

18 THE COURT: And I just ordered that if the releases
19 exist they should be attached. So, you'll have everything
20 you need to file any objection that you need to file.

21 MR. SAKELO: Your Honor, our approach has always
22 been - I think the Court is starting to appreciate the
23 complications of trying to articulate in advance without any
24 contracts before it and without any facts and basically
25 trying to process a lot of state law to define what a valid

1 settlement is. Our approach in order to reduce the
2 complication was to say, if the contract is enforceable under
3 applicable non-bankruptcy law, then it is enforceable because
4 it is what it is, and if it requires a release then it
5 requires a release. The release is simply a condition
6 subsequent to the contract and it is what it is. It depends
7 on state law and that's why - It's not because we didn't want
8 releases to be a material factor. It's only a material
9 factor if state law provides for releases, and that's why we
10 thought just leaving the definition as enforceable under
11 applicable non-bankruptcy law captures the essence of
12 everything.

13 THE COURT: That's fine. If you want everybody to
14 fill out questionnaires, that's fine, you pick, because
15 otherwise, I have no basis on which to know what it's going
16 to come in as a settled or not-settled claim, and I am not
17 going to litigate till the cows come home who is and who
18 isn't filling out the questionnaires. I've given you a
19 bright line test. If you don't like it then I'll reverse
20 what I said before and everybody will fill out the
21 questionnaires. You pick.

22 MR. SAKALO: Well, Your Honor, I guess we're going
23 with the release provision as articulated by the debtors.
24 Let me invite Your Honor's attention to the second issue that
25 was raised in our submission that we filed this morning, and

1 that's the issue with respect to - Mr. Bernick articulated
2 the process, and the process that we're envisioning is that a
3 settlement proof of claim is submitted and then the debtors
4 check their records, they have 21 days to send out a notice
5 as to whether they agree that this is a valid settlement in
6 existence or whether they don't agree, and the question is,
7 what happens is if they don't agree with the fact that a
8 settlement is in place? What we have proposed is that, first
9 of all, in order to narrow the issues so the Court doesn't
10 have to listen to all of these claims, that it would be
11 referred to the mediator in the first instance so the parties
12 can exchange information and see if they can resolve it
13 without involving the Court. The second step to this too is
14 not to require the claimants to fill out questionnaires while
15 the whole idea of the notion of their settlement is in
16 dispute, because that's the entire reason. It's no good for
17 a claimant to fill out a questionnaire -

18 THE COURT: I don't think this should be an issue
19 that much, because if you've got something in writing and
20 you've got the documents attached, then whether the debtor
21 has it in the debtor's records or not unless the debtor has
22 some reason to think there's a fraud going on, that's going
23 to be pretty good evidence that there was a settlement, and
24 if it's an oral agreement the clients have to fill out the
25 questionnaire. So frankly, from my point of view, that

1 should have eliminated at least 99 percent of the objections
2 right there.

3 MR. SAKELO: Perhaps, but it's tough to predict
4 going forward whether the bright line is going to be enough.
5 There might be factors of interpretation as to how these
6 documents that evidence the settlement in the record are
7 interpreted, and for those sorts of situations, while it gets
8 processed through the mediation -

9 THE COURT: It's going to be a real easy matter of
10 interpretation if it's up to me, and I'm going to look at the
11 four corners of the documents, and it's either going to
12 provide that somebody has in fact settled a claim for a
13 specific number, that there will be or has been a release
14 given, that the debtor will pay or has paid a certain amount
15 of money, and pretty much, that's going to be it. And if it
16 doesn't have those magic components to it, it's not going to
17 be a settlement. So, I don't think it's going to be all that
18 tough.

19 MR. SAKELO: We've suggested that the dispute be
20 referred first to the mediator.

21 THE COURT: There is no reason for that that I can
22 see right now. I reserve the right to change my mind about
23 that depending on how many objections come in and what the
24 nature is, but I don't see any need for it right now.

25 MR. SAKELO: Your Honor, the fourth issue that was

1 raised in our submission was putting a deadline on the
2 debtors to notify the claimants who have settlements that
3 they agree are valid and it sounded from Mr. Bernick's
4 comments that the debtors will accept that suggestion. We
5 also suggested as a more minor technical detail on our proof
6 of claim form, there's a Part I on the proof of claim form
7 that the debtor suggested, and it has a box that claimants
8 are supposed to check and just so everybody's clear when
9 they're filling this out, we suggested that there be
10 capitalized letters added at the end of the check box which
11 says that, you know, since you're - When you check the box,
12 you're basically electing to have the questionnaire
13 considered as part of your proof of claim, and the
14 capitalized letters that we're suggesting to add basically
15 say that you still have to file the proof of claim in
16 addition to filing the questionnaire.

17 THE COURT: Okay. I'm sorry, maybe I missed this
18 one. Let me take a look at the form for a minute. You're
19 looking at Exhibit A?

20 MR. SAKELO: It's - Did Your Honor receive a copy of
21 our submission?

22 THE COURT: No, I did not.

23 MR. SAKELO: All right.

24 MR. BERNICK: Your Honor, we'll accept that last
25 suggestion that counsel made.

1 THE COURT: All right.

2 MR. BERNICK: So the last two issues that were
3 raised, (a) when we have to make a commitment that we agreed
4 that it's settled, and (b) his capital letters point we are
5 agreeable to and will work with him to include them.

6 THE COURT: Okay, that's fine.

7 MR. SAKELO: Finally, there's various points in the
8 notice in particular, and I think there's one point in the
9 order in which the debtors are requiring the claimants to
10 complete the questionnaire as opposed to answer the
11 questionnaire. The degree of which somebody completes the
12 questionnaire is really subject to the motion to compel.

13 THE COURT: That's fair.

14 MR. SAKELO: That's for September 11, so we would
15 prefer the more neutral answer.

16 MR. BERNICK: Your Honor . . . (microphone not
17 recording) by September the 11th we are going to have, I
18 believe - the mediation is set for August the 29th. The
19 matter is to be heard on September 11th. This is all before
20 these folks have to do anything. So, really, I mean, I
21 suppose in kind of an unfortunate way it is amusing, but the
22 whole idea of a questionnaire was not that people not answer
23 them, it was that they answer them. So, if what they're
24 doing is preserving their right to make objections, it
25 doesn't seem to me that we ought to bless the idea that

1 people are going to be objecting to these things even more
2 than they already have.

3 THE COURT: I think it's very unlikely, having gone
4 through the process that this Court went through for days
5 about the questionnaire, that a whole lot of objections are
6 going to be sustained to the information requested on the
7 questionnaire. So, folks get it filled out and get it
8 returned. It's now no longer just the debtor's mechanism for
9 asking for something for estimation. It's now a formal
10 discovery. So, you can file an objection if you've got one,
11 but we went through this at length. The language was vetted
12 by everybody who was present in court. The courtroom was
13 filled on all of those days, so frankly, I don't think you're
14 going to have too many objections that will be sustained.
15 There may be some. I'm not ruling in advance, but the
16 presumption that I'm going to make is that this questionnaire
17 was essentially what everybody agreed on could make sense for
18 the parties who had to fill it out and could be returned in
19 some completed fashion. So that's the presumption I'm
20 starting with.

21 MR. SAKALO: That's a fair point, Your Honor. I
22 understand where the Court is coming from. The reason why we
23 made this particular suggestion was that number one, we are
24 hoping and at least we've been working with the debtor under
25 the assumption that these materials would go out by September

1 1.

2 THE COURT: Okay.

3 MR. SAKELO: So that the settled claimants would
4 have 45 days up until the October 16th deadline to get their
5 materials together and send the proofs of claim in. So the
6 issues on the motion to compel will hopefully happen after
7 the bar date materials go out, and the second point is, is
8 that we feel that by requiring claimants to answer the
9 questionnaire, they're going to answer it according to how
10 this Court rules on September 11, so we feel that our
11 suggestion captures the essence of the direction the Court is
12 going.

13 THE COURT: So you want it basically to say, Check
14 here if you returned the questionnaire to Grace and want it
15 to be part of your proof of claim form; is that -

16 MR. SAKELO: No, Your Honor, let me see if I can
17 find an example in my submission.

18 MR. BERNICK: Yeah, I think I can make it simpler.
19 First, whoever is going to have objections to the face of the
20 questionnaire, they're all going to get resolved because if
21 they haven't participated in the process, they've been
22 invited to and they've declined to participate, so, in a
23 sense filling out the questionnaires will no longer be the
24 subject of objections. The objections will have been
25 resolved. If counsel would feel more comfortable with our

1 saying they must answer the questionnaires as opposed to
2 complete, we would agree with that provided that we're not
3 going to then hear some kind of argument by people coming
4 into court saying, Oh, well, we were very careful. All we
5 did was answer. We didn't have to complete. In other words,
6 I don't want this to be used as a sword to somehow argue that
7 because we've agreed to it, that somehow that means that
8 people don't have to do what they're supposed to do.

9 THE COURT: Well, the problem is that the Committee
10 is here and could make that agreement, but they can't speak
11 for everybody who's going to get this form, and so there
12 isn't any way, I think, that I can make a ruling that says,
13 Answer means complete, which is pretty much what you're
14 suggesting.

15 MR. BERNICK: No, no, to the - It seems to me it's
16 the contrary. It's the same thing that you have in a case of
17 what we went through with the property damage people. The
18 property damage people ultimately were involved in litigation
19 over the form of claim that would be submitted, and that
20 required effectively the same kind of thing that we're now
21 doing through the questionnaire. All that we're doing is to
22 say, If you are a non-settled claimant, you are then going to
23 have to complete the questionnaire. Your Honor has the power
24 to do that, the Committee is representing all claimants in
25 connection with the bar date. There's no reason why they

1 don't represent these folks with respect to the very issues
2 that are spelled out in the bar date.

3 THE COURT: What about just simply say, Fill out.
4 Not answer, not complete, fill out and return.

5 MR. BERNICK: Fill out. We're -

6 MR. SAKELO: Very well, Your Honor.

7 THE COURT: Fill out and return the questionnaire.

8 MR. SAKELO: Okay.

9 MR. BERNICK: Are we done with -

10 THE COURT: Does anybody have an objection to "fill
11 out"?

12 MR. PHILLIPS: Not on that point, Your Honor, but I
13 wanted to make one point. Going back a little bit to the
14 issue with regard to the requirement that asserted settled
15 claims, completed questionnaire upon, I guess, an objection
16 by the notification by the debtor that they don't believe
17 their books show that a claim is settled. My only concern if
18 someone again in the trenches is actually dealing with this
19 is that we get different answers at different times from the
20 debtor as to whether a claim is settled or not. Earlier in
21 the case we get a letter from some random person at K&E
22 saying we have these claims of yours as settled, and then
23 just last week we get a different list of claims that are
24 settled, they believe their settled, and they are trying to
25 work with us, but my point is, I don't think the Court should

1 operate from this assumption that the debtor's books and
2 records are the be all/end all of the fount of knowledge.

3 THE COURT: I don't. I'm not. I think I said
4 earlier today that in the event that the documents, that
5 there are written documents and they are attached to the
6 proof of claim form, then whether the debtor's records show
7 them as settled or not, if in fact they're in writing, I
8 don't expect to see objections by the debtor saying that
9 their books and records don't contain the forms because now
10 they do. You've just submitted them.

11 MR. PHILLIPS: Right.

12 MR. BERNICK: I'm a little perplexed because in
13 light of counsel's appearance at the last hearing and the
14 complaints that somehow we were suggesting that by their
15 failure to submit the questionnaires they had failed to do
16 something that they were doing, we specifically had reached
17 out to - is it the Simmons firm?

18 UNIDENTIFIED SPEAKER: SimmonsCooper.

19 MR. BERNICK: SimmonsCooper firm to find out what
20 they believe is settled and what they believe is not settled.
21 We have no desire to have any uncertainty with respect to
22 what our books and records say.

23 MR. PHILLIPS: Well, Your Honor, that's my point is,
24 they reach out and we get a completely different list - well
25 prior list, and the import of this is that these are the

1 people -

2 MR. BERNICK: Excuse me, if I can -

3 THE COURT: Mr. Bernick, let him finish, please.

4 MR. PHILLIPS: These are the people - The issue is
5 not - There's two issues. One, the global issue, are they
6 settled or not, but the real live impact of this is if the
7 debtor comes back and says, We don't think you're settled
8 based on our books and records, which I'm saying here aren't
9 reliable and seem to change based on the pace of the case,
10 that claimant is being forced to go forward with answering a
11 questionnaire based on the debtor's current books and records
12 -

13 THE COURT: Apparently I'm not being clear. If the
14 claimant's settlement is in writing and the documents are
15 attached, a settlement agreement, something that has to do
16 with the release one way or another and an indication whether
17 or not the claim has or hasn't been paid, whether the
18 debtor's records show that there is a corresponding entry or
19 not, if all the documents are attached, a letter from the
20 debtor, a letter from the law firm and a release, whether the
21 debtor's records show it or not you've substantiated that
22 there is some reason to believe it's a settled claim, and I
23 don't expect to get an objection from the debtor based on the
24 fact that there is nothing in their books that supports it
25 because you now will have shown prima facie evidence that the

1 claim was settled, and the debtor can't simply say, we don't
2 have any evidence in our books to attack that prima facie
3 claim.

4 MR. PHILLIPS: I'll let the point go, Your Honor. I
5 just wanted -

6 MR. BERNICK: Please do because, Your Honor, there's
7 all this - our lists have changed. I don't know where this
8 is coming from.

9 MR. PHILLIPS: It's because we have new information.

10 MR. BERNICK: Excuse me.

11 THE COURT: Gentlemen.

12 MR. BERNICK: Excuse me. We specifically reached
13 out to his firm to resolve these matters so we wouldn't have
14 to take up court time. The debtor is not - We set out what
15 the criteria were, and we're going to stand by them. If it's
16 not in our books and records that they got the goods, we're
17 not going to be sitting there pestering the Court. So I
18 don't understand what the beef is here.

19 THE COURT: I don't either at this point. I don't
20 expect to see spurious objections. I do not expect to see
21 it. People will not be paid for filing spurious objections.
22 In case I need to make it anymore clear, they will not be
23 paid, and I'm going to make sure Mr. Smith knows this. So, I
24 will be getting objections in the event that there's an
25 issue. Now, having dealt with the written, if there's an

1 oral - alleged oral settlement and the debtor doesn't have
2 any evidence in the books and records that in fact there is
3 no settlement, I do expect - actually, I don't think it's
4 going to be an issue, because if it's an oral agreement the
5 claimant has to fill out the questionnaire and return it
6 anyway without the debtor worrying about books and records.
7 So, I don't see how this books and records issue is going to
8 come up very often.

9 MR. PHILLIPS: I just wanted to make a point, Your
10 Honor, thank you.

11 THE COURT: Okay.

12 THE CLERK: Sir, please enter your appearance.

13 MR. PHILLIPS: Sorry, Robert Phillips,
14 SimmonsCooper.

15 MR. LOCKWOOD: One other item that is more of a
16 scheduling item that relates to the order that was submitted,
17 Your Honor. The debtor's order, and you'll see we objected
18 to this in the certification we filed, provides that the
19 Court will hear and decide whether a claim is a settled pre-
20 petition asbestos claim or non-settled pre-petition asbestos
21 claim at the December 18, 2006 omnibus hearing. That assumes
22 that it's going to be - Well, let me back up a second. Your
23 Honor has been focusing on this discussion so far in terms of
24 the obligation to fill out a questionnaire, and obviously if
25 the only consequence of taking the debtor's view of things is

1 to fill out a questionnaire, one can understand how Your
2 Honor would arrive at that, but the fact is that what they're
3 doing is filing an objection to a formal proof of claim that
4 says, I have a settled claim. That initiates, under the
5 Bankruptcy Rules a contested matter, and while Your Honor may
6 well ultimately conclude as you have preliminarily concluded
7 today that certain prerequisites apply in all the 50 states -

8 THE COURT: No, Mr. Lockwood, I haven't concluded
9 that. I'm addressing who has to fill out a questionnaire and
10 under what circumstances.

11 MR. LOCKWOOD: Okay.

12 MR. BERNICK: I have a proposal to make that might
13 expedite this. Our goal in creating the process that Mr.
14 Lockwood has made reference to and the - in pegging December
15 the 18th, is that in the event that we come up with situations
16 that involve significant numbers of claims -

17 THE COURT: Mona, hit that button, please. I'm
18 sorry, Mr. Bernick.

19 MR. BERNICK: Yeah.

20 THE COURT: Thank you.

21 MR. BERNICK: The whole purpose of that date was to
22 be able to have a backstop such that if we've got a big
23 problem that we've run into where people have not attached
24 documentation that we believe reflects a settlement and
25 involves a significant number of claims, we want to have the

1 opportunity to have the matter placed before Your Honor
2 pursuant to a set procedure so that Your Honor can look at
3 the issue that has arisen and say, Yeah, maybe I won't decide
4 forever that the claim wasn't settled. But on the basis of
5 what I've seen, I want you to fill out the questionnaires
6 because otherwise we take all - we don't even take the
7 pressure, they'll simply will be a disagreement. We'll say,
8 You haven't met it. They'll say, Oh, yes, we have. And they
9 won't fill out the questionnaires.

10 THE COURT: Maybe the notice needs to be changed to
11 say that if you claim that you have - If the contention is
12 that you have a settled claim and the debtor disputes it,
13 then the Court will decide on December 18th whether for
14 purposes of filling out the questionnaire you have a settled
15 claim or not.

16 MR. BERNICK: Fair enough. That's -

17 MR. LOCKWOOD: Okay, Your Honor, that's actually in
18 the order -

19 THE COURT: Okay.

20 MR. LOCKWOOD: - where they set the omnibus
21 hearing. So it's the sentence and their version of it is
22 page 5, it's the second full order paragraph at the bottom of
23 page 5 and the second to last sentence there that needs to be
24 revised in the manner that Your Honor just described.

25 THE COURT: Okay.

1 MR. BERNICK: We will - What I was going to suggest
2 is that we will, with the benefit of this discussion here, go
3 back and submit within - let's say, what, by when - Before
4 the end of the week, we'll circulate a revised set of
5 documents and then we have the same thing that says if we
6 can't reach agreement then by next Wednesday we'll submit it
7 to the Court or Thursday, we'll submit it to the Court.

8 THE COURT: Okay, does that solve that problem, Mr.
9 Lockwood?

10 MR. LOCKWOOD: It does, Your Honor.

11 THE COURT: All right.

12 MR. BERNICK: Okay. I think that the only thing
13 really of consequence left on PI is just a little bit of the
14 status report and, Your Honor, we'll get - furnish copies of
15 these for everybody, but essentially, here's where we stand
16 now on the questionnaires. It turns out that 116,000 of them
17 were mailed out. This number does not include the settled
18 claims. You're seeing apples and apples, and of the ones
19 that were sent out under the understanding that they were not
20 settled claims, there were 116,000 of them total, 55,000 or
21 about 46.7 percent have been returned, and this is now
22 current as of a more recent date, but essentially that
23 percentage hasn't changed. We reviewed the last time the
24 responses from the top 20 firms, and you can see that in many
25 cases some of the numbers have shifted around, and that

1 again, not including settled claims, got 6,800 claim forms,
2 have submitted 1,100, Barron Budd 63 versus 3,800; Siber
3 Pearlman is much closer, 3,151 versus 3,127. We're talking
4 about a very substantial delta between the number of claims
5 that we had on file as being - our records reflected were
6 pending not settled and the ones that had been returned. Of
7 the ones that had been returned -

8 MR. LOCKWOOD: Your Honor, I'm sorry. I object to
9 this. We're having a hearing in three weeks on the motion to
10 compel. I don't for the life of me understand why at 6:30 at
11 night we have to listen to a self-serving explanation from
12 Mr. Bernick about somehow or another his complaints. Why do
13 we need a status conference on a subject that we're going to
14 have evidentiary hearing and objections. Everyone of these
15 firms that has - well, I shouldn't say everyone, but lots of
16 them, there are multiple objections on file with the Court.
17 Many of the firms have attempted to explain the discrepancies
18 between the number of questionnaires they got and the number
19 returned.

20 MR. BERNICK: Your Honor, I'm sorry, I -

21 THE COURT: Mr. Bernick, I can't - Really, please, I
22 really wish you would not interrupt. I cannot concentrate on
23 two people talking at the same time especially with this
24 noise that's coming from this air conditioning system. I
25 can't hear you.

1 MR. BERNICK: With all due respect, Your Honor, I
2 think I was the one who was interrupted. I have listened to
3 hours of self-serving statements. All we were doing is we
4 doing exactly what we did at the last hearing which is to
5 provide the data.

6 MR. LOCKWOOD: And I objected to it -

7 MR. BERNICK: And Mr. Lockwood may not like it, but
8 it's what's actually going on.

9 THE COURT: Well, I think at this -

10 MR. LOCKWOOD: Why do we need this. I'm objecting
11 to it, Your Honor, as -

12 THE COURT: I sustain your objection.

13 MR. LOCKWOOD: Thank you.

14 THE COURT: I don't need it today. I will be
15 hearing it in connection with the evidentiary hearing in
16 three weeks, and it is late so I don't need it today.

17 MR. BERNICK: I think that that then means that
18 we're left with two matters.

19 THE COURT: Mr. Monaco had something he wanted to
20 put on the record first, Mr. Bernick.

21 MR. MONACO: Thank you, Your Honor. As Your Honor
22 is aware, I represent the State of Montana which also is
23 contribution indemnification. I just wanted some
24 clarification from the Court. I was reviewing the form, the
25 proof of claim form, and looking at the definition of non-

1 settled pre-petition asbestos PI claims. It could arguably
2 apply to some of the contribution indemnification claims we
3 have because there was a few lawsuits that were filed prior
4 to the petition date against both Canada - I'm sorry, against
5 the debtor and Montana where we may have cross-claimed.
6 Given what the debtor is trying to accomplish here and the
7 fact that Your Honor exempted Canada and Montana from filling
8 out the questionnaires, I just wanted to make sure and hear
9 it on the record whether or not this would apply to
10 contribution indemnification claims.

11 THE COURT: I didn't understand that that's what the
12 debtor wanted, but let me ask the debtor.

13 MR. BERNICK: I don't think that - No, it doesn't.

14 MR. MONACO: Okay. Thank you, Your Honor. I just
15 wanted to get that on the record. Thank you.

16 THE COURT: Okay.

17 MR. BERNICK: I think that means, Your Honor, that
18 we have two matters that are left over that relate to Mr.
19 Speights. One is the late authority issue and the other is
20 the Anderson Memorial case, and with that I think -

21 MR. PHILLIPS: Your Honor, I hate to interrupt. My
22 motion was actually number 11 on the docket. I don't know if
23 the debtor wishes to push it, and that's why we're being
24 moved aside for Mr. Speights. I'll go with the debtor's
25 agenda, but we were on - they put us on the docket. I had

1 offered to move us to September 11th, to put everything
2 together, but, I'm prepared to go forward today, but I'll
3 defer to the debtor.

4 MR. BERNICK: (Microphone not recording.)

5 THE COURT: What's your motion, I'm sorry. What's
6 number 11?

7 MR. PHILLIPS: Your Honor, SimmonsCooper - we filed
8 a motion on behalf of our claimants who responded to the
9 questionnaire, which we defined as the claimants, to allow us
10 to move forward with discovery against the debtor and third
11 parties, and that motion has been joined by a couple other
12 law firms, none of whom I believe are in the courtroom today,
13 but, again, I'm not sure - the debtor put the agenda together
14 and they apparently moved passed it, so -

15 MR. BERNICK: No, we're happy to address it right
16 now. It's a pretty simple issue.

17 THE COURT: Go ahead.

18 MR. PHILLIPS: All right. Your Honor, basically,
19 you know, I came to this a little bit late. There's two
20 issues here, I think, Your Honor. One is, it seems a
21 principle of fundamental fairness and due process that if
22 someone is being asked to respond to discovery by one side to
23 a litigation and that's certainly what the questionnaire is.
24 Today we've also heard the questionnaire's being adopted and
25 bootstrapped into the proof of claim process so as to be made

1 a discovery vehicle for all, which I have another point upon,
2 but fundamentally it was originated as the debtor's
3 discovery, and the Court allowed this to go forward on the
4 basis of, well, "It's the debtor's discovery", quote/unquote.
5 That being the case, Your Honor, I think it's only fair that
6 the other parties to the litigation, namely the claimants, be
7 allowed to prove up their own cases. Now the debtor makes a
8 lot of points about, well, it's not necessary. It's not
9 needed. It's burdensome and so forth, and, Your Honor, I
10 would say as to claim forms that limit themselves to what's
11 your name? Do you allege an injury? What is your medical
12 condition so that we can put you properly and categorize you
13 as to what kind of claim you're bringing? I would agree.
14 However the debtor's questionnaire goes far beyond that. The
15 debtor's questionnaire asks about exposure to their products.
16 It asks about exposure to other companies' products. It asks
17 about settlements with other parties. It asks about
18 practically everything that touches upon in any conceivable
19 way the merits of the claim the person is bringing. And
20 given that, I think the Court needs to look at the fact that
21 the issue is not just whether the claimant has a claim
22 against Grace. Your Honor's made a lot of points about how,
23 well, they had to know something for them to have filed a
24 proof of claim or to have brought suit, and that is true,
25 Your Honor. The claimant maybe had to know something, but

1 the debtor's asking far more than that and is going to use
2 the information for far more than that. The claimant may
3 know, Well, I think I was exposed to Grace because of X, Y,
4 and Z, but they don't know about A through W, which they
5 would have learned through discovery in the litigation, and
6 if this material is actually going to be used in any
7 meaningful manner in this estimation process or claims
8 objection process or so forth, it's important to know, well,
9 how good is the claim. I mean if the claimant comes forward
10 saying, Well, I worked for a year as a plasterer, and I think
11 I used monokote during that one year. That's great. Maybe
12 that's prima facie enough in the debtor's view to bring a
13 claim. However, if through discovery, as often is the case,
14 they can prove that they were exposed to Grace products for
15 15 other years at 6 other job sites working for 10 other
16 employers, the nature of that claim is substantially
17 different than what is going to be shown by just the
18 questionnaire answered by the claimant himself using the
19 claimant's attorney without any benefit of discovery from the
20 debtor, and if this information is truly going to be useful
21 in any kind of meaningful estimation process, that
22 information needs to come out. Otherwise, all we have is the
23 bare bones minimum under the state equivalent of Rule 11 to
24 bring a complaint and that information being used by the
25 debtor and its experts to say, Well, even if these group of

1 claimants have this claim, they only have this level of
2 claim. Their evidence only rises to this level or because
3 they're in the wrong category of occupation, their claims
4 aren't worth much, therefore, the experts will hypothesize
5 that the aggregate claims will be much less. However, if
6 these claimants were able to develop their cases and say,
7 Well, yeah, that's true, but through discovery I could have
8 learned that I had 15 other years of exposure to the debtor's
9 products, and therefore, that claim and all the claims like
10 it, get elevated in value as certainly they would be. Well,
11 that's certainly meaningful evidence that the Court would
12 like to know and the experts would like to know to be able to
13 pronounce to the Court what these claims are worth.

14 THE COURT: You have the right to take discovery
15 against the debtor. I'm not going to opine as to the
16 reasonableness of what that discovery is now, but this is an
17 objection process. The debtor has raised some discovery
18 issues. If you think your clients are not able to
19 appropriately, you know, assert what their claims are without
20 some discovery, you can take some limited discovery, but it
21 is going to be limited, because, frankly, your clients ought
22 to know where they worked for the past 20 years and whether
23 the debtor had some product.

24 MR. PHILLIPS: Well, I would agree, Your Honor,
25 universal interrogatories of the nature of where are all the

1 juice-applied products in the North American market, I would
2 agree would be inappropriate. On that point, Your Honor,
3 just to follow up, I mean, I wasn't really certain because
4 (1) the motion to compel in our view, the motion to compel
5 the debtors have brought saying that the current answers we
6 have out there or the current completion or fill out, however
7 the terminology we're using today, that that is an objection,
8 and by the very nature of bringing their objection and motion
9 to compel in all of our claims, they've created contested
10 matters, and I note that paragraph (9) of the amended CMO
11 says all written fact discovery and all throughout the order
12 it talks about all parties, any parties, and so forth without
13 any limitation to certain denominated entities. You know,
14 and therefore, if Your Honor's ruling is today we can go
15 forward with discovery, of course subject to the debtor's
16 objections, then I will stand down and beam accordingly.

17 THE COURT: I think you've got the right to take
18 some discovery.

19 MR. BERNICK: Well, Your Honor, I think I'd like to
20 visit on that for a moment. In connection with the property
21 damage claims, we are told it really can't be estimation.
22 It's got to be adjudication of objections. In the case of
23 personal injury, we're doing estimation not the adjudication
24 of objections, and they want to take discovery as if there
25 are objections. There are not objections to their claims.

1 You have a bar date that's being filed. They will file their
2 claims by the bar date. We have not set out a process at
3 all, for objecting to any of their claims. Therefore, as to
4 their individual claims, there is no contested matter.
5 There's no right to discovery. There's nothing.

6 THE COURT: Well, if there isn't a claim, yes.

7 MR. BERNICK: There's not even a claim yet.

8 THE COURT: So, when there are proofs of claims
9 filed, if the debtor has some objection to the proof of
10 claim, they have the right to take some discovery.

11 MR. BERNICK: If the debtor has and lodges an
12 objection to the proof of claim, I would agree. At that
13 point we would have a process whereby they would have to
14 answer and demonstrate what they had to support their claim,
15 and if we then contested their claim, we could be talking
16 about individual claim discovery. That's a different CMO.
17 This CMO deals with an estimation, and the estimation is not
18 the adjudication of individual claims. In contrast to
19 property damage, we had specifically said that we're not
20 seeking to disallow, allow or disallow, any of the individual
21 claims. We do have a contested proceeding. It's a contested
22 proceeding that I don't even know whether this gentleman here
23 or his clients has standing to participate in because it
24 doesn't really involve their claims. This is an estimation
25 where the Personal Injury Committee will be representing the

1 interests of the claimants as to estimation in the aggregate.
2 Now, that is a contested proceeding. That is a contested
3 proceeding, as a result, we have discovery that relates to
4 it. We are taking discovery in the form of the
5 questionnaires. We know that the Personal Injury Committee
6 has been very diligent in showing up at the Cambridge
7 document depository taking boxes and boxes and boxes of files
8 out of the document depository for purposes of preparing
9 their estimation case. So, this case management order deals
10 with the estimation. It doesn't deal with anything else. It
11 contemplates there will be discovery that's relevant to the
12 estimation. You then say, Well, what is relevant to the
13 estimation? The answer is, the claims are relevant to the
14 estimation insofar as they inform the expert testimony of
15 people who will be testifying on both sides -

16 THE COURT: Yes -

17 MR. BERNICK: - which then brings me to -

18 THE COURT: - but the point is that the information
19 may not be sufficient because the claimant doesn't know all
20 of the places or products of the debtor.

21 MR. BERNICK: It may not, and that will go to the
22 weight of the evidence that's offered by whatever party seeks
23 to proffer the questionnaires as being evidence about what
24 the value of the claim is. That's something that we're going
25 to have. That's an issue that we're going to have to

1 address. I'm very, very comfortable addressing that issue in
2 part because we're talking about claims now that are five
3 years old and have been through the entire litigation process
4 with respect to all kinds of other defendants. These aren't
5 people who are walking out saying, Gee, I've got a claim.
6 I've got to go figure out what's going on. These are people
7 who have had claims for years that have been pending, that
8 have had massive discovery against Grace. They've had
9 discovery against the other companies. They've had doctors
10 come and look at them presumable to prosecute their claims.

11 THE COURT: Well, some of them may, but surely not
12 everyone's in that position.

13 MR. BERNICK: Every - Your Honor, talk about being
14 in the trenches. Every single claimant who is a part of this
15 list, almost without exception, is represented by counsel.
16 The number of lawyers who are involved in the asbestos
17 litigation process is actually relatively limited. They've
18 got it down to a machinery. Every single one of their claims
19 is prepared however they're going to get prepared in order to
20 maximize -

21 MR. PHILLIPS: Your Honor, I object to Mr. Bernick's
22 representation as to how we file our claims.

23 MR. BERNICK: Excuse me. Excuse me.

24 MR. PHILLIPS: (Microphone not recording) . . . but
25 that's going a little far afield.

1 MR. BERNICK: Your Honor -

2 THE COURT: I don't think the issue is the claim.

3 The issue is whether or not this is mature litigation. Mr.

4 Bernick's position is that it is mature litigation, and that

5 everyone out in the tort system has had the benefit of the

6 knowledge that's out there in the tort system for years.

7 Your point is that specific claimants in filling out the

8 questionnaire may not have it. It seems to me that the best

9 way to go about solving this dilemma is to take some

10 information from the disclosure statement, post it on the

11 debtor's website, and refer any claimant who has a question

12 about what entities Grace operates or what product Grace used

13 to the website, and then they can find out in advance whether

14 or not there's some product claim or plant location.

15 MR. BERNICK: Well, Your Honor - I'm sorry, Your

16 Honor. We're not - to get involved in disclosing to the

17 claimants where we operated and where our products are so

18 they can figure out whether when they filed a claim against

19 us in 2000 they had the basis for doing it. Your Honor, the

20 touchstone here is a contested estimation process.

21 THE COURT: The touchstone for this Court is to

22 figure out what the best estimate of the amount of a trust

23 that has to be funded based on what legitimate claims,

24 because that's the point you've been raising since the outset

25 of this case -

1 MR. BERNICK: Correct.

2 THE COURT: - you want to look at the legitimate
3 claims, so I want to get in the universe of legitimate
4 claims. It doesn't cost the debtor virtually anything to
5 publish on its website the list of the debtor-affiliated
6 entities, the product that the debtor has used that contains
7 asbestos that the debtor recognizes, and probably the plants
8 where that was either manufactured or represented from.
9 Other debtors have done it, I see no reason why it can't be
10 done.

11 MR. BERNICK: Your Honor, no, I'm sorry. I'm sorry.
12 This is something that's completely divorced from the reality
13 -

14 THE COURT: Fine, then I'll just let him take
15 discovery -

16 MR. BERNICK: No, but, Your Honor -

17 THE COURT: - Mr. Bernick, pick, choose.

18 MR. BERNICK: That's fine. We can go ahead and
19 we'll take discovery and we'll take discovery of all the
20 doctors and their relationships with the lawyers. The point
21 is this. None of their experts, none of the Personal Injury
22 Committee's experts are asking for discovery that's relevant
23 to the individual claimants. Not a one of them.

24 THE COURT: Well, how do you know that?

25 MR. BERNICK: Because we know. They haven't served

1 us with any such discovery. In all the other cases that they
2 litigate they don't want to know about that stuff. What they
3 want to know about is the claims that we've settled -

4 THE COURT: All right.

5 MR. BERNICK: - not the current claims. Number
6 two, we are not in the situation of having a bar date for
7 purposes of finding out other claimants who are out there.
8 This bar date is specific to people who already had claims
9 pending against Grace as of the time of the filing.

10 THE COURT: Yes, I understand that.

11 MR. BERNICK: So they've already made their claims.
12 We don't have to go tell them how to go make a claim, they've
13 already made their claims. All we're doing in the
14 questionnaires is finding out what they know to be the basis
15 for their claims so that the experts then can have a data set
16 that says, Well, for whatever value it has, this is what was
17 known to support the claims as of the time the questionnaires
18 are filed. If they - there's an individual claimant wants to
19 come in who hasn't even filed a claim and doesn't even have
20 an objection to the claim, and on a participatory basis
21 participate in the estimation process so that this gentleman
22 here is going to go file discovery so that he can participate
23 in the estimation process, we can talk about that, but then,
24 the next thing that's going to happen is we're going to be in
25 here asking for individual claimant discovery and the lawyers

1 and the doctors and how the claims were put together. It's
2 got to be one or the other. We can't have the Committee say,
3 No, you can't do that, which is what they've said, and then
4 have an individual law firm come in here and say, I want to
5 do it.

6 THE COURT: Look, this is my point. I want the best
7 information that's available for the use of any expert who's
8 going to make use of it. That's all. That's the point. I
9 don't see how the debtor is harmed by listing on its website
10 who the affiliate debtors are who were in bankruptcy and the
11 products that it listed. You're going to have to do that in
12 the disclosure statement and plan for purposes of figuring
13 out who has claims against varieties of insurance policies
14 and things anyway. I mean, all the other debtors have done
15 it, Mr. Bernick. What's the issue?

16 MR. BERNICK: What's the point? I mean, you're
17 going to have a bunch of people then come and say, Oh, I got
18 exposed to the - you've got a laundry list. They'll all list
19 all the products and say, Well, I was exposed to them all.

20 THE COURT: Maybe you will.

21 MR. BERNICK: But what's the point of that?

22 THE COURT: The point of it is that if they know
23 what product they're exposed to, they'll fill out a proof of
24 claim which your experts, hopefully, will evaluate, and if
25 they list that they were exposed to all of the products, in

1 all probability your expert's going to throw out that
2 information with good reason.

3 MR. BERNICK: Your Honor, they are all represented
4 by counsel. Counsel has had access to this information and
5 more information for years, and indeed, has enough
6 information to be able to make sure that the questionnaire is
7 filled out properly.

8 THE COURT: Mr. Bernick, what is the issue about
9 putting the stuff on the website?

10 MR. BERNICK: Because I don't understand how it's
11 even appropriate. We are -

12 THE COURT: List the debtors for public information
13 purposes what debtors in bankruptcy -

14 MR. BERNICK: That's not - Obviously, putting
15 something on the website is not a big deal. That's not what
16 my point is. My point is this: We have gone through an
17 extended process with the Bodily Injury Committee, and we
18 have litigated and litigated and litigated exactly what's
19 going to take place, and we've been shut down from a lot of
20 things that we wanted and the questionnaire and otherwise.

21 THE COURT: And if somebody opens it up, you'll be
22 opened up.

23 MR. BERNICK: No, I know what's going to happen
24 which is this gentleman comes in and says for some reason he
25 wants this, and we say, Okay. Well, if you're going to get

1 that, we now want to go back and ask more questions of all of
2 the claimants so that we can explore what this gentleman has
3 opened the door to, and Mr. Lockwood is then going to say,
4 Well, that was just this gentleman here. He's not the
5 Committee. He doesn't speak for the Committee. There's got
6 to be -

7 THE COURT: All right. Individual claimants, in the
8 event that a proof of claim is filed and some objection is
9 filed, will have the right to do some limited discovery.
10 That's what I started this process with.

11 MR. BERNICK: That's fine.

12 THE COURT: For purposes of filling out the
13 questionnaires, if the people want to know who the debtors
14 are, what the debtor's products are, and where the debtor's
15 major operations were, the debtor has an obligation to
16 provide that information to the claimants, and I'm ordering
17 the debtor to do it. You can do it one of two ways. You can
18 attach it to the notice that goes out so everybody has it or
19 you could put it on the website and you can refer the
20 plaintiffs to the web - the clients, not the debtor can refer
21 the claimants to the website in the event that there's an
22 issue that they want to discuss with their clients. You
23 pick.

24 MR. BERNICK: Well, Your Honor, I will - we'll pick
25 the website -

1 THE COURT: Fine.

2 MR. BERNICK: - or we'll pick the other one. The
3 real question is what this now means to the Personal Injury
4 Committee is going to pick by way of drawing the lines
5 because we will now serve discovery -

6 MR. LOCKWOOD: Can I speak to that, Your Honor?

7 THE COURT: Yes.

8 MR. LOCKWOOD: Mr. Bernick has just explained his
9 view of what the Committee's been up to for the last several
10 years in the context of announcing that this is a contested
11 proceeding involving estimation in the aggregate not an
12 allowance. What Mr. Bernick conveniently is ignoring here,
13 which will undoubtedly come up on September 11th, is that as
14 the Court noted when Mr Bernick said I'm concerned that in
15 this aggregate estimation proceeding, many of these claimants
16 may not answer the questions, so I need to obtain
17 jurisdiction in this Court over each and every one of these
18 claimants, and therefore, I want a bar date. Your Honor
19 pointed out to Mr. Bernick at that time, which only happened
20 a couple of months ago, not years ago, that once he got
21 people to file claims the bankruptcy rules intervene and he
22 is now blithely saying, Well, I'm not going to object to
23 these claims. Well, under the bankruptcy rules, what happens
24 when you don't object to a claim. It's deemed allowed. Now,
25 Mr Bernick is, Oh, no, we're not having anything to do with

1 allowance of claims here, but he was the one who decided that
2 he wanted a bar date so that he could force people who he
3 otherwise didn't have jurisdiction to give you discovery.
4 So, he's now got 118,000 or 160,000, or whatever it is,
5 contested matters once these people file claims or he can
6 live with the consequences of having the claims deemed
7 allowed for purposes of his experts and whatever that means.
8 Secondly, with respect to these constant iterations that
9 these claims have been out there for five years and there's
10 massive discovery against Grace. That's what he said.
11 Massive discovery against Grace, there hasn't been any
12 discovery of Grace for five years because of the automatic
13 stay. And he says, Oh, well, the lawyers know. The lawyers
14 may know what clients who they settled or they litigated with
15 Grace before the bar date that came to trial that went
16 through discovery. I haven't the vaguest idea nor does Mr.
17 Bernick have the vaguest idea how many of these people with
18 the pre-petition litigation claims against Grace actually got
19 discovery from Grace about their claims, and this business
20 about, Well, if you know what product Grace manufactured and
21 you know where they manufactured it, as Mr. Phillips will
22 tell you, that's not the critical thing. The critical thing
23 is, Where was the product used, the job site, because that's
24 where you get exposed for most of these people not in the
25 factory. I mean to some extent Mr. Bernick is correct in his

1 comments about the website. The website will only give you
2 the sort of most generalized level of information that a
3 client and his lawyer would need to know for the client's
4 particular claim how many times, as Mr. Phillips explained,
5 the client was at job sites where monokote was used, and Mr.
6 Bernick says, Well, the Committee hasn't been seeking that
7 information. That's because up until October - November the
8 15th of 2006, there will never have been any asbestos personal
9 injury claims filed in this case, and the Committee has been
10 the one that has all along proceeded on the assumption that
11 we weren't going to have any kind of allowance process, and
12 that we were going to have an estimation that was going to be
13 dealt with in the aggregate. What Mr. Bernick has done is by
14 trying to create an aggregate estimation process that as he
15 constantly asserts is going to involve his experts testifying
16 about the validity of individual claims in order to get what
17 he thought was the tactical advantage of getting discovery
18 orders out of this Court, forcing the individual claimants to
19 give him information, he's the one that chose to go down the
20 bar date route. If he wants to go down the bar date route
21 and take all the discovery from each of the 118,000
22 claimants, he can start I guess doing that. I would suggest
23 to the Court, however, that if he does that, we're going to
24 be here for another five or ten years, and I'm not sure that
25 the Court, when it comes time to consider the exclusivity

1 issue, is going to find that a terribly attractive process.

2 MR. PHILLIPS: One minutes, Your Honor, I'd like to
3 rebut Mr. Bernick's -

4 MR. BERNICK: What is one point?

5 MR. PHILLIPS: You rebutted me, I get to rebut you.
6 Our firm was - just one point. There are certain firms out
7 there, you see their names, who may very well have binders of
8 documents on certain job sites that are superior to what
9 Grace itself knows. My firm was founded in 1999, middle of
10 1999, not even two years before Grace filed bankruptcy, by a
11 pair of lawyers less than five years out of law school. To
12 say that we have this vast information library at our
13 disposal for Grace for all the claims we have across
14 Illinois, Missouri, and now, you know, no one's talking about
15 the tens and hundreds of thousands of claims filed since
16 petition date, but we have them all over the country now. We
17 haven't been doing discovery against Grace. We hadn't done
18 hardly any discovery against Grace prior to Grace filing
19 bankruptcy. There are some firms, like I said, who may be
20 able to produce volumes of information, but there are a lot
21 who aren't, and I just think it comes down to fundamental
22 fairness. If Grace can propound 30-page questionnaires with
23 boxes and sub-parts and sub-parts of sub-parts upon our
24 clients, asking particulars about our claims, about their
25 exposures, their other exposures, their doctors, who employed

1 their doctors, whether their doctors smoked, whether their
2 doctor smoked cigarettes recommended by the lawyer. If they
3 can do that, why can't we at least ask questions about where
4 their products were sold or as Your Honor has pointed out,
5 what those products were. I, myself, am at a loss to
6 understand Mr. Bernick's reluctance to simply post a product
7 list and a list of entities. I mean, there's a long list of
8 entities, the footnote at the first page of every pleading.
9 I don't quite understand the reluctance to go down that
10 route.

11 THE COURT: Well, I'm going to have the debtor post
12 a list of the debtors, a list of the products, and a list of
13 the, I guess, major either manufacturing plants, job sites,
14 whatever it is that's appropriate that the debtor had.

15 MR. BERNICK: Your Honor, before you say that, the
16 major job sites, what does that mean?

17 THE COURT: Well, I don't know.

18 MR. BERNICK: That's the whole point is that we're
19 dipping out toe in - the whole purpose of this exercise is
20 to take a snapshot of the tort claims as they were as of the
21 date - I'm sorry, Your Honor, this is just the reality of
22 what it involves. I know it's late, but what we have now is
23 -

24 THE COURT: But the reality is, though, Mr. Bernick,
25 that in the tort system, before this case was filed, everyone

1 of these claimants who had sued the debtor at some point
2 would get discovery from the debtor about the products, what
3 entity from the debtor's point of view it had a claim against
4 and possibly other discovery that may be necessary with
5 respect to where that product was either acquired or used, it
6 would happen. Otherwise, they wouldn't be able to prove the
7 case in the tort system.

8 MR. BERNICK: Yeah, but that's not what we have
9 here.

10 THE COURT: But it is what we have here. You're
11 asking for a bar date, and I want truthful claims.

12 MR. BERNICK: Okay, Your Honor, I want to go back
13 over this because we're once again getting a little bit off
14 the track, I think.

15 THE COURT: I'm not off the track. This is
16 discovery with respect to making sure that somebody has a
17 legitimate proof of claim filed, and if the debtor disagrees
18 with it, the debtor will file some objection, and at that
19 point a different form of discovery will be opened, but the
20 client has the right to know from the debtor what the
21 products are, who the debtor was, and where the likely
22 exposure was.

23 MR. BERNICK: I will say, Your Honor, that the same
24 issue arose - I'm going to get back to why I think Your Honor
25 is being taken down a path that is very understandable, but

1 is fundamentally at odds with what we're about here. Judge
2 Vance got the same request or when there was a bar date set
3 down in New Orleans in the Babcock & Wilcox case, and the
4 same request was made. Your Honor, we'd like to have a list
5 of all the Board recites of Babcock & Wilcox. If she turned
6 to Elihue (phonetical) Inselbuch, who was - I don't know
7 whether Peter was there then, said, Wait a minute. You are
8 the ones that have the claims. The purpose of this discovery
9 is not to tell you whether you've got a claim or not. You're
10 not going to get the list, and the list was never produced
11 during the entire history of the Babcock & Wilcox case, but
12 for -

13 THE COURT: How do you know you have valid claims?

14 MR. BERNICK: That's the whole point, Your Honor, is
15 that you have a valid claim - You should know you have a
16 valid claim before you lodge the claim to begin.

17 MR. LOCKWOOD: It was never produced because we
18 never got to the point where -

19 MR. BERNICK: Your Honor, Your Honor - that's not
20 true.

21 MR. LOCKWOOD: - there was a claims disallowance.

22 THE COURT: Gentlemen, stop, please.

23 MR. BERNICK: Could I have the courtesy of not being
24 interrupted so I can make a point?

25 MR. LOCKWOOD: Your Honor, he just gets up and

1 misrepresents what happened in a courtroom that I was
2 present.

3 THE COURT: That's all right, Mr. Lockwood -

4 MR. LOCKWOOD: Yeah, she said to -

5 THE COURT: Mr. Lockwood, you may rebut his argument
6 when he's finished. Go ahead, Mr. Bernick.

7 MR. BERNICK: Your Honor, we could take a snapshot
8 in April of '01 of the claims that were pending at that time,
9 and we could follow those claims forward and say, Let's
10 pretend that there was never a bankruptcy but only to the
11 extent that the claims are now here, let's go forward and
12 litigate the claims. That is the approach that I advocated
13 at the beginning of this case with respect to personal injury
14 was to have common issue, actual litigation of these claims.
15 That is to tee up these key issues about the reliability of
16 evidence and the impact of Dalbert and move under Rule 42. I
17 was systematically shut down that there was no way that that
18 could possible ever be achieved. It was useless to talk
19 about the adjudication of these claims. The only thing that
20 could happen was to have an estimation. What does the
21 estimation mean? The estimation means that we're trying to
22 determine what the value of the claims would be like in the
23 future, but it's a different future. State substantive law,
24 that's true, but it's not the state tort system. It is
25 federal court, federal determination about the estimated

1 value of the claims, therefore Dalbert applies. So, we
2 could in the context of this estimation now, say, oh, well,
3 now it's an estimation. Let's go forward and find out what
4 these claims really would have been worth under that
5 scenario, and allow new discovery to people like the fellow
6 from SimmonsCooper so that his law firm can learn what
7 everybody else has known for awhile, and they could come up
8 to speed. That position, that is that estimation should
9 hinge on the best possible information about these claims,
10 that position was rejected by Your Honor last time in
11 connection with the property damage claims, because that is
12 estimation as I was proposing then. I said, the way to do
13 the estimate is actually to gather evidence in the same kind
14 of way; remember? I said, Bring the evidence in. We'll have
15 it there in April, and we'll have an estimation, use
16 estimation as another way of determining the merits of the
17 claim.

18 THE COURT: No, it's a different standard.

19 MR. BERNICK: It is the same -

20 THE COURT: No, it is not, Mr. Bernick. There is
21 not a future damage issue with respect to property damage.
22 The properties are either -

23 MR. BERNICK: I'm not talking about property -

24 THE COURT: - well, that's the purpose for the
25 estimation.

1 MR. BERNICK: But the only way to get the futures is
2 by estimating the merits of the current.

3 THE COURT: Exactly.

4 MR. BERNICK: So, we're talking about the current.

5 THE COURT: Which is why you don't need to estimate
6 for property damage because there are no futures.

7 MR. BERNICK: Well, that may or may not be. You
8 can't estimate with respect to - You can only estimate with
9 respect to futures from the PI point of view, but that's not
10 the issue. The issue is what evidence are we talking about
11 being relevant to the estimate, and if we're going to go
12 forward and have them gather new evidence out of Grace's
13 files to support their claims, what we're really saying is,
14 we're going to pretend as if we are now litigating all of the
15 claims that never got litigated as of April 1.

16 THE COURT: Wait. Why is who the debtors are, what
17 products they had that contained asbestos, and where those
18 products were either manufactured or distributed new
19 evidence? It should be old evidence.

20 MR. BERNICK: Well, it's apparently new evidence in
21 support of these people's claims because they don't have it
22 yet, but, Your Honor, there will always be -

23 THE COURT: This is a fairness process, Mr. Bernick.
24 The debtor can't hide evidence and decide that somehow or
25 other you're then going to convince -

1 MR. BERNICK: And I believe that we're now going to
2 - this will require - Maybe we should have a separate hearing
3 on this, but we're going down the same kind of revisiting
4 that we did last time in connection with -

5 THE COURT: We do it every month.

6 MR. BERNICK: What?

7 THE COURT: We revisit every month.

8 MR. BERNICK: That's unfortunately the case, but
9 back in - what you're really doing in estimation is that
10 you're not taking all the claims as they were pending in
11 April and now gathering evidence about whether they were good
12 or bad based upon new discovery that's taking place.

13 THE COURT: I understand that. Your experts want to
14 take a look at these claim forms with a view to seeing into -
15 I'll call them buckets, what bucket they want to put the
16 particular -

17 MR. BERNICK: No.

18 THE COURT: - claim that's filed -

19 MR. BERNICK: I'm sorry. It's a little bit
20 different from that. They're saying here's the world as it
21 was in April 2001. It's a snapshot.

22 THE COURT: Yes.

23 MR. BERNICK: As of any point in time in this
24 history, because you've got to get to the history or trend in
25 order to do any of these projections, as of this point in

1 time there will be claims that were very mature, lots of
2 information. There will be claims that even were settled.
3 There will be a lot of claims that were immature. There will
4 be claims that have never even been investigated. That's
5 just the way that it is, and the estimators will have to deal
6 with each of those claims differently. You don't take all
7 the claims that were pending as of April 1 and then attempt
8 to make them all the same by saying, We're now going to give
9 everybody the opportunity to come forward and try to conduct
10 the discovery that maybe they would have liked to conduct to
11 find out whether their claim was good, bad, or indifferent.
12 All you have is a snapshot and you take it as it is. All the
13 questionnaire did was to ask people what evidence they had to
14 support their claims, and it deliberately froze them here.
15 We recognize that there will be people from the SimmonsCooper
16 firm, perhaps, and perhaps other firms that don't have the
17 same information as people from like the Real, Morgan & Quinn
18 (phonetical) firm. And the estimators will have to
19 characterize this spectrum of claims and say, Yes. Some of
20 the claims were well supported, some of the claims were not
21 well supported, and they will stratify this population by how
22 much were the claims worth and whether there was the evidence
23 to support them, and the reason that you have to do that,
24 Your Honor, is if you do anything else, you'll destroy the
25 ability of projecting that snapshot forward and talk about

1 future experience. If you went into the process now and say,
2 Oh, we're going to now open up discovery for all the
3 individual claims, you will turn claims that were really not
4 being brought by very sophisticated firms when it came to
5 Grace, into the equivalent of claims that were being brought
6 by firms that were totally versed in Grace's history and were
7 able to demonstrate, and there were dramatic differences
8 between the values the different firms would be able to get
9 from Grace depending upon exactly the kind of variations that
10 have been brought. So, there is a reason why you take a
11 snapshot, and there's a reason why you don't say that
12 estimation means that we're not going to pretend like we're
13 litigating these claims with the benefit of hindsight. There
14 is another problem, and it's an even more central problem. I
15 can deal with Mr. Lockwood on a good day. I can deal with
16 Mr. Lockwood and debate how much discovery we get and how
17 much discovery he gets in order to support the experts who
18 will testify. I think I know what his experts are going to
19 say. I've had the pleasure of dealing with them in court on
20 other cases. I know how their models work. I know what
21 they're going to do, and God bless them, Peter knows the same
22 thing with respect to ours. So, we craft in our minds what
23 discovery is it that we need in order to have our experts
24 testify and we carve out in this contested matter the arena
25 of necessary discovery. Okay. Now, in order to get that

1 discovery, it's true, as Peter says, we were only getting a
2 piece of the spectrum. Not everybody was returning their
3 questionnaires. So we said, Yeah, get a bar date going so
4 that people can make up the information deficit. I have to
5 tell you, Your Honor, this was in a service of trying to get
6 as much information as we could from people -

7 THE COURT: I understand that, that you want as much
8 information as you can.

9 MR. BERNICK: But - I'm sorry, Your Honor, as much
10 information as we can that's necessary to get to this point.
11 And we can do without the bar date. We don't need the bar
12 date. What will happen to their claims? There will be this
13 enormous hole in their claims. They want - the futures want
14 this information to come in, but here's the thing, if we have
15 the bar date and Mr. Lockwood's right and filed the claim, we
16 have to make an objection. I'm prepared to deal with the
17 consequence of what happens and that we do have to make an
18 objection. That's fine. I can take on that kind of burden,
19 but what I can't take on is people then injecting into the
20 estimation process the litigation of their individual claims.

21 THE COURT: It's not going to be a matter of
22 litigation of the claims. I think we're talking over each
23 other's heads.

24 MR. BERNICK: That's exactly what this gentleman
25 here is talking about.

1 THE COURT: No, he's not. He's - If I - I believe
2 what Mr. Phillips is saying, he may have a cadre of clients
3 some of whom have filed or intend to file proofs of claim
4 against Grace. They believe that they were exposed to a
5 particular product at a particular time, and as a result they
6 will fill out the proof of claim form with that information.

7 MR. BERNICK: Right.

8 THE COURT: But the reality is that they may also
9 have worked at another site where Grace had a different
10 product at a different time.

11 MR. BERNICK: Could be, could be, Your Honor.

12 THE COURT: And as a result, their proof of claim
13 may not be totally or as accurate as it can be.

14 MR. BERNICK: That's true in any case. That's what a
15 proof of claim is about. That's what taking a snapshot is
16 absolutely all about, but for him to come in and say, I want
17 to make sure that my proof of claim is as complete as
18 possible, that is, that I really do have a claim against
19 Grace. I want to go conduct the discovery maybe of his
20 interests because he thinks that in some fashion his claims
21 are being compromised -

22 THE COURT: But they're not.

23 MR. BERNICK: This has nothing to do with the
24 adjudication of his claims. Now, if Mr. Lockwood wants to
25 come in, on the other hand, and he wants to take the position

1 that his experts need that kind of information on a global
2 basis with respect to all of Grace's claims, that is, he
3 wants to say, not just Mr. Phillips who comes in for
4 SimmonsCooper but Mr. Lockwood who comes in for the PI
5 Committee and says, In this estimation, my experts require
6 information regarding individual current claims or they can't
7 do the estimate, I haven't heard that, and the reason that I
8 haven't heard it is that the last thing that they want is to
9 have individual claim discovery that's going to go right back
10 to the doctors and right back to the lawyers. They haven't
11 even asked for it.

12 MR. LOCKWOOD: Your Honor -

13 THE COURT: Okay, my turn. My turn. Mr. Phillips -

14 MR. PHILLIPS: Yes.

15 THE COURT: Your clients should complete the proof
16 of claim form based on whatever information they currently
17 have. I will still require the debtors on the website to
18 list the debtors, the products that contain asbestos that the
19 debtor manufactured, distributed, sold or whatever is some
20 contention for liability, and if the debtor had either
21 plants, mining facilities, or some major distribution points,
22 those locations are to be listed. I am not going to require
23 the debtor to list major job sites because, frankly, I don't
24 think that's going to be of any value in this process. If
25 you choose to look at that website, you may. If you don't,

1 that's fine. If your clients think that they were similarly
2 exposed elsewhere and have no evidence of it, they can add
3 that to the proof of claim that there may be additional
4 locations, but they have no evidence to support it.

5 MR. PHILLIPS: Your Honor, part - Mr. Bernick asked
6 in a sense, what's my dog in this fight and why am I here and
7 other people who may follow in my train, the debtors have
8 asked for all this information. They've asserted in big bold
9 type all throughout the questionnaire how it's supposed to be
10 complete. There's none of this provisional language we're
11 hearing today about how this is supposed to be a snapshot or
12 an expert's supposed to tell the difference between a claim
13 that's one month old and a claim that's, you know, twelve
14 months old at the time - for the life of me, I don't
15 understand that distinction, but they've also asked we, as
16 the attorneys, to sign under penalty of perjury that
17 everything is accurate. Well, I'm telling Your Honor here
18 today, it's not going to be accurate for purposes of being
19 incomplete. If my client spent one year at a major place,
20 like at Granite City Steel, one of the major steel foundries
21 in southern Illinois, and we know maybe that there was W.R.
22 Grace monokote there, but that person worked at six other job
23 sites, and in that case, we would have gotten discovery from
24 Grace that would have said yes or no whether - or from, the
25 other point here is for third parties -

1 THE COURT: Mr. Phillips, for purposes of having an
2 accurate proof of claim form, you can set out the locations
3 that you know and add a sentence that says there may be
4 others that we are not identifying because we don't have
5 sufficient information. I think that will satisfy your
6 obligation and your clients under penalty of perjury. It
7 will satisfy Mr. Bernick's with respect to the fact that his
8 experts who look at this will know that there is one
9 location, that there may be others, if that's relevant, and
10 then if there's an objection, I will deal with individual
11 discovery. I want the debtor to post on the website the
12 information that I just listed so that people who have some
13 knowledge that they worked at a particular place can at least
14 go back and make as accurate a proof of claim as possible.
15 Okay, Mr. Lockwood.

16 MR. LOCKWOOD: Mr. Bernick keeps talking about this
17 snapshot, and he said, we don't want to have any information
18 about what people would learn through discovery after the
19 snapshot. What's the questionnaire? It didn't exist at the
20 snapshot. If he's entitled -

21 THE COURT: Well, no. The questionnaire, as I
22 understand it, for purposes of laying out what information
23 the claimant had as of the snapshot.

24 MR. LOCKWOOD: It doesn't ask that question. It
25 asks the question how much on November - I don't remember.

1 It asks what information the plaintiff and his lawyer have as
2 of mid-2006 about his claim. That's what it asks. It doesn't
3 say anything about what information did you have at the
4 petition date about your claim, much less give the
5 plaintiffs, as Mr. Phillips just pointed out, and their
6 lawyers an opportunity to say, Well, gee, I didn't have much
7 information because I haven't been able to get any discovery
8 from Grace yet.

9 MR. BERNICK: This is the same exact -

10 MR. LOCKWOOD: Would you please, Mr. Bernick -

11 THE COURT: Gentlemen, I know it's late, but please.

12 MR. LOCKWOOD: Your Honor, I'm sorry, but you
13 instructed me not to -

14 THE COURT: And I will instruct Mr. Bernick, please
15 let me do that. Mr. Bernick, don't interrupt.

16 MR. BERNICK: Sorry, Your Honor. Sorry, Mr.
17 Lockwood.

18 MR. LOCKWOOD: Mr. Bernick has - he says we do not -
19 my Committee has not asked for this information. He's right,
20 we haven't, yet. But I want to make perfectly clear . . .
21 (microphone not recording). We didn't take the position, as
22 Your Honor is fully familiar with, that this snapshot
23 methodology is ridiculous.

24 THE COURT: Right.

25 MR. LOCKWOOD: Because the plaintiffs won't know

1 how much evidence they have because not only are the not
2 being asked for it as of 2001 and given the opportunity to
3 explain why . . . (microphone not recording) but they're also
4 being asked for it now in 2006 and these experts, who we've
5 never to this day heard anything other than the most general
6 description from Mr. Bernick about how these experts are
7 going to testify. He says he knows how my experts are going
8 to testify. That's true, he does, and Your Honor does too,
9 but I haven't the vaguest idea how his experts - I can't even
10 begin to imagine how the experts are going to stratify
11 118,000 claims where some of the claimants might have had the
12 claims on file four years before the petition date and have
13 gotten a lot of discovery from Grace about product ID and
14 stuff like that. Some of the claims might have been filed a
15 week before -

16 THE COURT: Mr. Bernick was correct about that.
17 That's all going to go to the weight of what they're doing.

18 MR. LOCKWOOD: I understand it's going to go to the
19 weight, but he says, I know - I've already figured out that I
20 don't need discovery to figure out how his experts are going
21 to testify. I haven't a clue how his experts are going to
22 testify.

23 THE COURT: Well, then you'll take the discovery, if
24 you need it, when his experts are identified.

25 MR. LOCKWOOD: I will, and we'll be taking

1 discovery, if necessary, of what sorts of information would
2 be available -

3 THE COURT: All right.

4 MR. LOCKWOOD: - to people five years ago with
5 claims of this sort.

6 THE COURT: Okay.

7 MR. BERNICK: Fine.

8 MR. LOCKWOOD: But the point is that he's not - He
9 wants to limit us and the claimants to what we knew or
10 without any discovery from Grace while getting from Your
11 Honor an order that says 118,000 or 180,000, however many of
12 those people have to be given this stuff, and now his experts
13 are going to give that discovery in this undisclosed fashion
14 and the idea that somehow or another the plaintiffs turn
15 around and say, Well, we would like some discovery back so we
16 could fill out the form better, fill out the questionnaires
17 better. Oh, no, no, no we can't - that would pollute the
18 questionnaire process because it would take the information
19 to a later date. That's just wholly one-sided.

20 THE COURT: Well, it is somewhat one-sided, but I
21 believe I've taken care of a large part if not all of the
22 one-sided aspect by requiring the debtor to post on the
23 website, which will be available to anybody who wants to look
24 at it, who the debtors are, where their major places of
25 business were, and the products that they manufactured that

1 contained asbestos over what periods of time. Now, if
2 somebody needs more than that, Mr. Lockwood, if it's an
3 individual claimant, I'm going to wait until there's an
4 objection to claim and see if there's something relevant. If
5 it's the Committee's experts, I'll hear from you.

6 MR. LOCKWOOD: One final point about that . . .
7 (microphone not recording).

8 THE COURT: Well, then, they'll all be allowed and I
9 won't need to worry about an estimation.

10 MR. LOCKWOOD: Well, Mr. Bernick -

11 MR. BERNICK: We'll deal - We'll - I just want to
12 know who my master - I just want to know who my master is and
13 for what purpose. If we make objections, as I'm sure we
14 will, and he was fair to point that out, we will then take up
15 the issue of what kind of discovery is really necessary and
16 that issue will be crossed at that time. What I'm trying to
17 get done is the estimation process, and my colleague, in
18 estimation, is Mr. Lockwood and his Committee, and I need to
19 have certainty about with whom I'm negotiating and arguing
20 against about what is relevant to the estimation process. I
21 can't contend with 75 or 50 or 25 law firms who are all busy
22 telling their story about what they knew and what they didn't
23 know.

24 THE COURT: No, I believe the estimation process is
25 within the control of the Committee. That would seem to be

1 something that is a Committee function in terms of defending
2 against or prosecuting whatever is going to be the
3 estimation.

4 MR. BERNICK: Now, if I could -

5 MR. LOCKWOOD: Just to finish, let me return here to
6 the debate about which methodology is the right one -

7 THE COURT: For?

8 MR. LOCKWOOD: For estimating claims whether based
9 on settlement history or on this snapshot process -

10 THE COURT: Oh, okay.

11 MR. LOCKWOOD: Remember what Mr. Bernick said to Mr.
12 Phillips a little bit ago about his firm being new and
13 inexperienced. He said, The best evidence - the reason we
14 need the snapshot is to figure out what the values different
15 firms were getting back then. And the values he's talking
16 about were not some estimate value of the claim at the time.
17 The values were the settlement values and the judgments that
18 Grace was experiencing in the tort system, and nobody in the
19 history of the universe has ever attempted to do this so-
20 called snapshot exercise in the manner that the debtors are
21 using here.

22 MR. BERNICK: Well, let me, Your Honor, because that
23 was as a kind of parting -

24 THE COURT: Okay, but literally two minutes each.
25 We need to get through this agenda, and I've already ruled,

1 and I'm not going to change my mind. So, Mr. Bernick, you
2 may have two minutes. Mr. Phillips, you may have two, and
3 then that's it. We're moving on. Go ahead.

4 MR. BERNICK: I'm sorry, Your Honor. I only rose to
5 respond to what was - Mr. Lockwood is obviously very
6 satisfied with that little parting shot, but to be clear, I
7 want to be able to deal with Mr. Lockwood and his Committee
8 on what's relevant to the estimation that's coming forward.
9 Mr. Lockwood says, The snapshot approach, oh my God, when has
10 this ever been done. His own experts take the snapshot,
11 exactly at the time of filing, and they calibrate their
12 period of time in reference to that snapshot and then they
13 take it going forward. The only issue is, what do you put
14 into that snapshot. All he wants to put in is the fact that
15 money has been paid out in settlement. We, ultimately, will
16 say that when it comes to the valuation of claims that have
17 merit, yes, the marketplace is some evidence of that, but the
18 claim has to be a meritorious claim because we are no longer
19 in the tort system in state court, never will be there. So,
20 the only difference that we're imposing is to say, You have
21 to take a look at that spectrum of claims and make a
22 threshold determination about which ones of them ultimately
23 are going to be provable, and this is actually done by the
24 experts themselves because they know about the whole problem
25 of what are called unknowns.

1 THE COURT: I understand -

2 MR. BERNICK: So, it's there.

3 THE COURT: I also understand what the various
4 District Courts recently have been writing with respect to
5 how the personal injury estimations are to be conducted. I
6 would advise all parties to take a look at it because some of
7 it seems to be a pretty darn good process for trial to me.

8 MR. BERNICK: Your Honor, that, I understand, and I
9 also would then - we'll be talking about those cases and the
10 approaches that are actually taken. What's happened in all
11 those cases is that nobody has fought the battle.

12 THE COURT: Well, that's okay. Mr. Bernick, I've
13 given you free range to produce your case the way you want to
14 produce your case.

15 MR. BERNICK: Well, I understand that. But I'm just
16 reacting a little bit, Your Honor, to the notion that somehow
17 those cases are the same as this. There's no other case
18 where somebody has taken on to fight the battle to get this
19 information. This information is information that's in the
20 newspapers. Everybody knows it's there. No court has ever
21 been pressed enough to say, Yes, let's get the information.

22 THE COURT: Well, this one has, and you're getting
23 the information largely the way you wanted it, not totally.
24 You've been given free reign to produce your estimation
25 witnesses and testimony however you choose, and so have the

1 other parties, and if I have a total disconnect between your
2 method and theirs, I'll have to decide what's appropriate.

3 MR. BERNICK: Fair enough. Last point, and then
4 I'll sit down. This period of time after the bar date, this
5 period of time after the bar date, Mr. Lockwood wants to go
6 down that road and talk about developments after April of
7 '01. That's a fair point and with respect to the estimation
8 models, there may be information after April 1 that will be
9 very relevant to determining the validity of their models.
10 We may want to seek discovery of it. So we're not adverse to
11 the idea of looking beyond the snapshot and saying, What else
12 has happened over time, but the touchstone is expert
13 estimation and sauce for the goose, sauce for the gander.
14 So, if Mr. Lockwood wants to sit down and talk about
15 discovery post-April '01, we're more than happy to do it, but
16 we can't.

17 THE COURT: Frankly, I don't want to talk about it
18 any more. I've made my ruling. I don't see that I have an
19 issue before me at this point. Mr. Phillips.

20 MR. PHILLIPS: Just real quick, Your Honor. We've
21 gone back and forth about if once we do file all our proofs
22 of claim whether they'll be, you know, not objected to in
23 which case it would be allowed, in which case, I guess, it
24 would be meaningless to go forward with discovery on either
25 side. But if, as Mr Bernick just stated, they are going to

1 object, and I would submit that probably sometime around July
2 1st, 2007, after the June hearings, I just want Your Honor to
3 think about the point, when does it make more sense to flush
4 out these claims and determine how good they are. After
5 you've had the estimation hearing and you realize, Whoa, we
6 would have had a lot better evidence, or now when we're still
7 almost a year away.

8 THE COURT: I think that issue was going to be for
9 the experts to tell me. They will take a look at the proofs
10 of claims, they will decide whether they need additional
11 information, if they do, I'll hear from them. If they think
12 it's adequate for whatever purposes they choose to use the
13 information, I'll hear from them along that line, and it will
14 all go eventually to whether or not the methodology satisfies
15 the Dalbert standards and/or whether or not the expert's
16 report and methodology turns out to be reliable from a
17 credibility/weight, I guess, purpose as opposed to a Dalbert
18 type of standard but the weight to be accorded it after that.
19 So, those issues can all come up in the context of the
20 litigation if and when it happens. My understanding from
21 early on in this case, which may have changed, but my
22 understanding was that to the extent the debtors file
23 objections to the proofs of claim, the intent is going to be,
24 essentially, to compel the Court into an estimation process.
25 That was the whole purpose, and that is the reason why the

1 debtor may be filing objections to 118,000 or however many
2 proofs of claim were filed because the Court at that point
3 cannot possibly liquidate and determine the allow-ability of
4 each of those claims in the plan confirmation process in
5 sufficient time to get the plan confirmed, and that is the
6 appropriate way to get into an estimation hearing. So,
7 whether or not I will ever need discovery after the debtor
8 has some objection, whether or not I will ever face an issue
9 with respect to discovery after the debtor files those
10 objections, isn't known to me. If the debtor is going to do
11 some sort of merit spaced objection, your clients will have
12 the right to do discovery. So, I'm going to take it as it
13 comes, but for right now, file the proofs of claim with the
14 information you have. You could check the website - When
15 will the website be up and running?

16 MR. PHILLIPS: Thank you, Your Honor.

17 THE COURT: Wait.

18 MR. BERNICK: I'll tell you what, we will make a
19 report to the parties on that. We'll promptly inquire of our
20 client and determine what -

21 THE COURT: Thirty days?

22 MR. BERNICK: Yeah, I'm sure.

23 THE COURT: Okay. The website will be up and
24 running before your proofs of claim are due so that you and
25 your clients can take a look at the information that's there.

1 If it is not sufficient for you in your viewpoint to know
2 that your client has in fact dotted all of the i's and
3 crossed all of the t's as to where it may have been exposed
4 to a debtor's product, then you can add something to the
5 proof of claim that says, This is what we're relying on.
6 There may be additional evidence that we simply don't have
7 information to support. And the experts will take it from
8 there. I will not take from the debtor an objection based on
9 the fact that someone adds to the bottom of a proof of claim
10 the fact that there may be some additional exposure that the
11 claimant cannot prove based on lack of discovery from the
12 debtor. I'm not going to accept that at this stage as an
13 invalid proof of claim, because I'm telling counsel they can
14 do it and satisfy their obligation -

15 MR. BERNICK: As long as they fill out the rest of
16 the questionnaire, if there's more information they say they
17 would like to add, we can't stop them from taking that
18 position. We just want to get all the questions answered
19 with the information that they have.

20 THE COURT: All right. So, I will do - Can I get an
21 order from one of you that will memorialize this so that the
22 process is in place?

23 MR. BERNICK: The process for - the website process?

24 THE COURT: No, the overruling or I guess the
25 granting of the motion - I'm sorry, I've forgotten on item

1 11.

2 MR. PHILLIPS: I was going to say, we want a
3 transcript first, Your Honor.

4 MR. BERNICK: No, no. The motion to set a bar date
5 -

6 THE COURT: No.

7 MR. PHILLIPS: Mine was the motion to amend -

8 MR. BERNICK: Oh, that. Well, I think that that
9 motion is denied at this time -

10 THE COURT: All right, this is SimmonsCooper's
11 motion.

12 MR. BERNICK: Yeah, I got confused.

13 THE COURT: I forgot. In the process I lost track
14 of who filed the motion. All right, denying SimmonsCooper's
15 request for discovery at this time, but requiring the debtor
16 to set up the website with this basic information for access
17 to anybody and for anybody without prejudice to re-file a
18 request for discovery, you know, at an appropriate time.

19 MR. PHILLIPS: Thank you, Your Honor.

20 MR. BERNICK: Thank you, Your Honor.

21 THE COURT: Now, who's going to prepare that,
22 please.

23 MR. BERNICK: We will -

24 MR. PHILLIPS: I don't know if they want me riding
25 their point about putting the website first.

1 THE COURT: All right, I want them to run it by you,
2 Mr. Phillips.

3 MR. BERNICK: There's no magic. I mean, what Your
4 Honor said about the website we'll stick in the order.

5 THE COURT: All right. That's fine. I'll sign it
6 when I get it. They're to run it by you, Mr. Phillips, to
7 make sure you agree that it memorializes my ruling.

8 MR. PHILLIPS: Thank you, Your Honor.

9 MR. BERNICK: There are two more matters that are
10 left on the agenda. One is the lateness of authority and the
11 other is the Anderson Memorial, and if Your Honor has got the
12 patience and stamina, maybe we should just do them or
13 whatever -

14 THE COURT: Do them.

15 MR. BERNICK: Okay. With respect to -

16 THE COURT: Which agenda number, Mr. Bernick,
17 please?

18 MR. BERNICK: I'm sorry?

19 THE COURT: Which agenda number?

20 MR. BERNICK: This is agenda item 7-A and then you
21 also asked to remind you that you wanted it brought up to
22 touch on 7-B, Romanet iii, which was the withdrawal and
23 expungement of 194 Canadian asbestos property damage claims.

24 THE COURT: All right.

25 MR. BERNICK: It's those two, and then item 8 on the

1 agenda. So, 7-A and 8.

2 THE COURT: All right, thank you.

3 MR. LOCKWOOD: What about agenda item 4?

4 MR. BERNICK: Which is?

5 MR. LOCKWOOD: Are we going to -

6 MR. BERNICK: Can we defer that one.

7 MR. LOCKWOOD: Except - I mean - Do you want to
8 defer that?

9 THE COURT: Folks, I'm sorry, but, please. Do you
10 want to recess for a few minutes or can we proceed, because -

11 MR. BERNICK: Yeah, I would like to - Let's proceed
12 and then if we have to do that, we have to do that.

13 THE COURT: We are going to go through the agenda.
14 So, however long it takes, that's what we're going to do
15 today. I'm not deferring any more of these matters. Mr.
16 Speights.

17 MR. SPEIGHTS: That's fine, Your Honor, and I'm
18 happy to stay as long as you want. I did want to tell you
19 that especially one of the items will be a somewhat lengthy
20 legal argument citing a number of cases, but if that's Your
21 Honor's pleasure, I'm here for the duration.

22 THE COURT: On which agenda, Mr. Speights?

23 MR. SPEIGHTS: On those authority - on the authority
24 question of people we represent with written authority
25 executed after the bar date.

1 THE COURT: All right.

2 MR. SPEIGHTS: And that involves a number of cases,
3 but I understand if you want to stay, I'm happy to stay, Your
4 Honor.

5 MR. BERNICK: I think it's doable. It's been
6 briefed, and I'm prepared to go through that right now. I
7 think it falls into some pretty easy categories. First, what
8 claims are we talking about? There were a total of six
9 remaining claims where there were factual matters that
10 remained to be tied down, and I think that we now have got
11 documentation on all six. Three of them, it turns out,
12 relate to one building. I'm just going to put them into the
13 record. They are claims 10952, 10960, and 11010. And those
14 purport to recite the authority that Mr. Speights had to file
15 the claim and further recite that the authority existed prior
16 to the time the claim was filed. So, those are no longer at
17 issue.

18 THE COURT: All right.

19 MR. BERNICK: We then have three additional, I mean
20 these are other issues that relate to them but not the
21 authority issue. We then have three of the six where we also
22 have obtained documentation from Mr. Speights and, therefore,
23 the question of documentation is not there, and they are
24 11125, St. Anthony's Hospital; 10749, which is the Glen Oaks
25 Club; and 11207, which is Lafayette Medical Center. And

1 we've got now the documentation of the authority, but they
2 now fall into the category of this late authorization because
3 the authorization took place after the fact of the claim
4 being filed. So we now have a list, and we'll furnish a copy
5 to Mr. Speights as well, and we'll furnish it up to the
6 Court. These are 61 claims that now present the remaining
7 legal issue, which has to do with what I'll call just the
8 post-fact authority. So, I don't think we have any factual
9 matters any longer to take up. It's purely a question of
10 law, and to illustrate the question of law, I'll just refer,
11 as an example, to these three last claims that we now have
12 received documentation . . . (microphone not recording)
13 authorizations for Speights & Runyan to file claims in the
14 Bankruptcy Court. I hereby authorize Speights & Runyan to
15 file a proof of claim. Same thing with respect to Glen
16 Oakes, same thing with respect to Lafayette, and we know from
17 the date - the received date stamp for Glen Oaks, it was
18 received May 18, of 2004. With respect to the St. Anthony's,
19 we have the fax date, which is July 27 of 2004. So, the
20 legal issue that's presented is whether authority given after
21 the fact constitutes appropriate authority to establish that
22 a claim that was earlier filed on behalf of the client was
23 timely filed. Now, I think if we boil down the briefs, and
24 it's the reason why I don't think this should take too long
25 and I'll await with interest what I know will be Mr.

1 Speights' explication of the law. What I tried to do in
2 order to crystalize it, was to talk about three major points
3 of authority that the debtor has and then three points that
4 Mr. Speights makes on behalf of his clients. The three
5 points that the debtor has are fairly straightforward. One
6 is the language of Rule 3001(b) which deals with proof of
7 claims, and says specifically, A proof of claim shall be
8 executed by the creditor or the creditor's authorized agent,
9 except as provided in Rules 3004-5, and authorized is not
10 only - it's past tense. That is, there has to be the
11 authority for the creditor at the time that the action is
12 taken. Essentially, 3004 is important because it's triggered
13 by and requires the action of the creditors, the action of
14 the creditor that's key and the creditor can act through an
15 agent, but it has to be the creditor that is taking the
16 action, and therefore, the agent must be an agent who is
17 authorized. Our second point in support of the same basic
18 argument is that this essentially was incorporated in the
19 proof of claim form - I'm sorry, the claim form that we have
20 in this case. This specifically said that all claims must be
21 signed by the claiming party. Now, certainly we would
22 entertain the possibility that the claimant could have
23 already have authorized an agent, but it is the claiming
24 party whose conduct was required in this particular case.
25 And our third point of authority is agency law, and agency

1 law construed in connection with Rule 3002 basically says
2 that an act is only the act of the principal if it in fact is
3 authorized and read in connection with 3001(b) that means
4 that the authorization must take place before the fact. This
5 is the first plus decision out of the Northern District of
6 Dallas in the context of talking about class certification.
7 It says, The concept of agency is so fundamental that it
8 barely requires articulation. An agency relationship, quote,
9 "Exists only if there's been a manifestation by the principal
10 to the agent that the agent may act on his own account in
11 consent by the agent to so act." Close quote. Or to put it
12 another way, quote, "Rule 3000(b) allows a creditor to decide
13 to file a proof of claim and to instruct an agent to do so.
14 It does not allow an agent to decide to file the proof of
15 claim and then inform a creditor after the fact." These all
16 converge on the same point which is 3001(b) requires the
17 action of a creditor and in this case, at the time the claims
18 were filed, there was no action of the creditor, and by the
19 plain terms of 3001(b), as a consequence, these claims were
20 not properly filed at the time and the claim form confirms
21 that by itself making clear that what's called for is the
22 action of the creditor, the action of the principal. So
23 those are three major points, Your Honor, and then Mr.
24 Speights raises three points in response. His three points
25 and the emerges in his final brief are these: He first of all

1 has two cases that he cites, the SEI case, and a 1959
2 decision out of New Jersey, and the name of that case - I'll
3 get it here in a moment. SEI vs. Norton, which is Eastern
4 District of Pennsylvania, 1986, and then you have City of
5 Trenton vs. Flower Thorn Company, 1959 Superior Court of New
6 Jersey Appellate Division. The SEI case does not really have
7 much to do with anything. This was not a situation in which
8 the rights of the principal were expanded by allowing
9 ratification after the fact. This is a case where
10 ratification after the fact by estoppel was used to limit the
11 rights of the principal, that is the principal was bound by
12 action taken by authorized counsel. So, estoppel or after
13 the fact ratification by estoppel was not a principal of
14 according authority to an agent and thereby binding -
15 allowing the principal to do what the principal had not
16 decided to do. It was the other way around. It was a way of
17 saying, you the principal cannot have a greater set of rights
18 than exist given the fact that you after the fact ratified
19 what your authorized counsel had done. So it does not inform
20 this case at all. The New Jersey case, the Trenton case, is
21 different from this case in principal part because it
22 predated the decision of the Supreme Court in the FEC case,
23 the Federal Election Commission case I think is the name of
24 the case. I'll get this in front of me in half a moment. It
25 is Federal Election Commission vs. NRA Political Victory

1 Fund, decided by the Supreme Court in 1994, and this case
2 then brings me to the third source of authority that Mr.
3 Speights had, which are the relation-back cases, and these
4 are really, in a sense, the most important point that Mr.
5 Speights makes and the most instructive on why the principal
6 that we have articulated in fact holds here. The relation-
7 back cases where basically a petition, for example, for
8 voluntary bankruptcy is filed and is later then ratified by
9 the principal, they do not apply if the filing that's at
10 issue must meet a deadline and the deadline applies to a lot
11 of different people. The filing is made before the deadline
12 and the authority is given after. The relation-back doctrine
13 does not apply where there is a deadline and a deadline
14 applicable to a number of people for the very specific reason
15 that relation-back cannot be used where there are other
16 intervening third-party rights that are affected by allowing
17 an after-the-fact ratification. So, if you have got a
18 filing, for example, filing of a petition for bankruptcy or
19 the filing of - I'll just use that as an example, the
20 petition is filed. If it's ratified after the fact, it
21 doesn't really make a difference to anybody else because
22 there is no deadline and nobody else is seeking to comply
23 with the deadline, and therefore, nobody else's rights, that
24 is the people who have filed timely with authority, are
25 compromised by the relation-back doctrine. We don't have

1 that here. Here we had a bar date. There was a definite
2 deadline, and everybody else had to follow the same deadline
3 and allowing relationship-back would allow Mr. Speights'
4 clients, who were given the benefit of relationship-back to
5 effect - in a sense to get an unequal position because nobody
6 else was given the benefit of that kind of flexibility and
7 their rights are affected. In the dispositive decision on
8 the relationship-back cases, is the Supreme Court's decision
9 in the Federal Election Commission case, and the case is
10 absolutely clear, and it's absolutely right on point, and it
11 says that where you have a specific deadline, you must have
12 authority that was granted before the deadline passed, and
13 the relevant language the Supreme Court used . . .
14 (microphone not recording). I'll just read it from over
15 here. We must determine whether this after-the-fact
16 authorization relates back to the date of the FEC's
17 unauthorized filing so as to make it timely. There the FEC
18 made an unauthorized filing that was later authorized by the
19 Solicitor General's Office, and so we conclude that it does
20 not. The question is at least presumably governed by
21 principles of agency law, and in particular the doctrine of
22 ratification. Quote, "If an act to be effective in creating
23 a right against another or to deprive him of a right must be
24 performed before a specific time as a deadline case, and
25 affirmance is not effected as against the other unless made

1 before such time." And it goes on to say, there's a
2 citation to the Restatement 2nd of Agency. Though in a
3 different context we have recognized the rationale behind
4 this rule. Quote, "The intervening rights of third persons
5 cannot be defeated by the ratification. In other words, it
6 is essential that the party ratifying should be able not
7 merely to do the act ratified at the time the act was done,
8 but also at the time the ratification was made." So, the
9 principle that was very clearly articulated by the Supreme
10 Court going back to fundamental agency principles, and it's a
11 decision after the City of Trenton case in New Jersey at the
12 New Jersey appellate system is that where you have a specific
13 deadline and the rights of others are affected, the
14 ratification must take place or the conferring of agency must
15 take place before the deadline. So, Your Honor, I think, in
16 fact, when Mr. Speights cites these cases, these
17 relationship-back cases, it takes us back to exactly the same
18 point which is the same agency law that was the basis for the
19 ruling made and the analysis done in the First Plus case, and
20 back to the same principle that we articulated at the
21 beginning of our argument here, and that is 3001(b) requires
22 the act of a creditor, and that in a sense is as far as you
23 have to go, but the reason it requires an act of the creditor
24 is that you're talking about a deadline, and under principles
25 of agency law, where you have a deadline, it is the creditor

1 who must act before that deadline, the creditor cannot wait
2 or be solicited after the deadline to provide the authority.
3 The authority must be there beforehand. So Mr. Speights in
4 arguing on behalf of his clients that he has the ability - or
5 they have the ability to provide the authorization of 2004
6 (a) is inconsistent with Rule 3001, and (b) is totally
7 inconsistent with the principles of agency law that have now
8 been adopted by the U.S. Supreme Court.

9 THE COURT: Mr. Speights?

10 MR. SPEIGHTS: Thank you, Your Honor. You'll recall
11 that we actually argued this months before. Ms. Browdy and I
12 argued it, I believe, in either December or January in
13 Pittsburgh, and Your Honor at that time focused on one issue
14 and requested supplemental memoranda, and both the parties
15 submitted supplemental memoranda, and I don't know - then we
16 had the stay and months have gone by, but I would urge Your
17 Honor to review our supplemental memoranda because I think we
18 refute everything that Mr. Bernick said, and if I in my tired
19 state don't do so, I would certainly refer back to that
20 memoranda. Let me go back to this: We argued before Your
21 Honor sometime ago the question of authority for people who
22 we had no contact with under the Anderson putative class
23 action, and Your Honor ruled on that, and while I don't like
24 to lose any ruling, and while respectfully, I think I was
25 right on that, the consequence of that was sort of

1 hypothetical because we still have the Anderson motion to
2 certify pending and if while I thought I had the right to do
3 it under the putative, if we win the Anderson class action
4 certification, I think we will be back at your door saying,
5 Let my people back in, and if we lose the Anderson
6 certification, and I hope that doesn't happen, it doesn't
7 matter what Your Honor did to begin with because at that
8 point I wouldn't have had authority either way on those
9 claimants. These claimants are altogether different. These
10 are clients who have retained Speights & Runyan, giving us
11 authority to act, and the only issue here is with respect to
12 some of them, is whether that actual authority had to be
13 prior to the bar date. They have given authority now, and
14 I'm going to argue ratification in a few minutes, and I just
15 point out that it's reflected, I think in the previous
16 transcript, there are some of those we claim we have old
17 authority from and ratified later, and there's some which I
18 would concede that we didn't have any authority from until
19 after the bar date, other than the putative class action and
20 then they gave us authority. And at the last hearing, as I
21 recall, you said, Well, we can work that issue out once we
22 deal with the gist of the issue we're dealing with now. But
23 I make the distinction between the first bucket of don't know
24 those people, and this bucket where they're actual clients
25 but the written document is later. They point out that, you

1 know, these are real people that if Your Honor rules against
2 them on this, obviously, there will be an appeal, and I'm not
3 a lawyer that says, We'll appeal. Your Honor knows,
4 everybody appeals everything. I mean, that's not why, but
5 this will - this issue will just not die today unlike the
6 other one which I didn't appeal, which is academic. This is
7 a matter that has extreme importance to some number of
8 claimants who want to participate in this bankruptcy, and
9 indeed, some might argue that if the ruling was against them,
10 might come along and file late filed claims and try to do
11 discovery, et cetera, et cetera, et cetera. And I say that
12 at the outset, I'll try to get to the point, that I still
13 believe that it is more appropriate to rule on this issue,
14 even more so than the last time after Your Honor decides the
15 class certification issue because if Your Honor certifies
16 Anderson as a class, then I believe that we will be in a far
17 different position of arguing authority here. We won't have
18 to discuss the hundreds, literally hundreds of cases of
19 dealing with ratification. And while I understand that the
20 debtor wants to press for it and get its ruling, et cetera, I
21 really see no downside in that because at the end of the day,
22 these are the easiest issues to decide legally. You know,
23 there's no time loss, and we should have the full record and
24 the full argument on the Anderson certification. However,
25 Your Honor, if you want to, and I assume you do at least for

1 the moment, want to proceed, then I will go to the merits of
2 the argument. I'm aware of Mr. Bernick's cases as he's aware
3 of my case. As the case he currently has on the board is a
4 case in which Your Honor said did not trouble you during the
5 December or January hearing. It was a question of whether
6 the solicitor general by statute is the only one who can file
7 a certain thing, and it is a situation where there's a
8 jurisdictional right to appeal. On the other hand, the First
9 Plus case, which I don't recall Your Honor commenting on, has
10 a very interesting . . . (microphone not recording). The
11 First Plus case, the simple point of it was that it did not
12 go along with the American Reserve, the Court of Appeals case
13 which Mr. Bernick has cited and which I have cited in the
14 past, and it wouldn't follow American Reserve, since then all
15 of the circuit that have dealt with the problem have followed
16 American Reserve, but the Bankruptcy Court here was
17 dissenting from the American Reserve view and in justifying
18 what it did, it said, The creditors whom the putative class
19 representative reports to represent are the principals, as
20 opposed to the class representative, in whom the power to
21 ratify such an act vests. Even in First Plus we have a . . .
22 (microphone not recording). Now, he's got the restatement of
23 the cases, and I've got the restatement of ratification.
24 He's got a few cases, I think I've got a lot more cases. My
25 supplemental brief goes into in some detail. And I believe

1 that the greater weight of the cases says that basic law of
2 ratification is that these people who have a claim against
3 Grace who had their product, these are product ID clients,
4 they can ratify my act, and I don't know how to argue that
5 other than saying, My cases are right and his are wrong on
6 the greater weight. But then I read his cases a little more
7 on that 14 hour train ride up here, and I began to see that
8 his cases really fall into ratification as a general rule,
9 but his cases basically are one of two types. The first type
10 is that there was no connection between the person who filed
11 the claim and, in this, instance the creditor. There was
12 just no connection whatsoever. That's a minority view, but
13 even if that were the correct view, I don't think that's the
14 situation here, and I don't think it's the situation because
15 it's not like we have no connection. Now, I'm not citing
16 American Reserve to Your Honor again to argue against what
17 you did before. The fact that you don't believe American
18 Reserve gave us authority to file the claims to begin with is
19 not the issue now. The issue is, does American Reserve give
20 us some connection to these claimants which justifies the
21 later ratification, and the American Reserve case . . .
22 (microphone not recording). Of course the leading Federal
23 Court of Appeals case and dealing with class action in
24 bankruptcy is now . . . At the top of the right column, it
25 says that - I'm trying to keep my microphone and read at the

1 same time.

2 TELEPHONE OPERATOR: Excuse me, Your Honor, this is
3 the Court Co. operator.

4 THE COURT: Yes.

5 TELEPHONE OPERATOR: It seems that the last couple
6 of attorneys in the courtroom that are speaking are cutting
7 out for about ten seconds.

8 THE COURT: Okay. I think the batteries may be dead
9 in that, Mr. Speights, which is part of the problem, so - Is
10 there anyone left on the phone?

11 TELEPHONE OPERATOR: Yes, Your Honor, I have several
12 attorneys. Some are just listening and some do have a live
13 line.

14 THE COURT: Okay, that's fine. Well I'll try to
15 keep the parties' voices up. They're using portable
16 microphones, and I think the batteries have died after
17 today's rather marathon proceeding.

18 TELEPHONE OPERATOR: Yes, Your Honor.

19 MR. SPEIGHTS: Your Honor, I think I can see it from
20 here now. American Reserves says the representative in a
21 class action is an agent for the missing and after the
22 citations it goes on to say, Not every effort to represent a
23 class will succeed. A representative is an agent only if the
24 class is certified. Putative agents keep the case alive
25 pending the decision on certification. So that we start off

1 with the proposition that when I filed these, whether that
2 gave me authority then as I argued before, I was doing so
3 with knowledge of the law, the law that Mr. Bernick has cited
4 in the past before Your Honor, that I had this obligation,
5 that I was an agent for the missing, and so, that provides me
6 some connection with the claimants in question. More
7 importantly, Your Honor, I would now like to provide Your
8 Honor with what I have often referred to since last summer,
9 the affidavit of John Freeman. That's the affidavit in which
10 I told you last year that prior to taking my actions in these
11 bankruptcy cases, Professor Freeman, professor of ethics, not
12 only said that I had the right to file claims on behalf of
13 putative class members in the Anderson case, but told me, as
14 reflected in this affidavit, that I had a fiduciary duty to
15 file claims on behalf of these absent class members that I
16 knew about. May I approach, Your Honor?

17 THE COURT: Yes. Thank you.

18 MR. SPEIGHTS: Your Honor, I believe that provides
19 the connection that deals with one or two of the cases. The
20 other cases, I believe, are easily distinguishable on the
21 grounds that they provided some absolute right by statute
22 that the debtor - well not a debtor, a party would be losing,
23 and I think the basic disconnect is between, on those again
24 minority cases, the basis disconnect between what a bar order
25 is and what, for example, a statute of limitations or a

1 jurisdictional problem would be, and those minority of cases
2 in some courts, several courts, cited by Ms. Browdy in her
3 brief, would have a problem allowing ratification. However,
4 in other cases, many that we cited including the Fourth
5 Circuit and the Eighth Circuit cases have allowed
6 ratification in such circumstances, the Huber case and the
7 Boyds case. In this instance, though, a bar date order, and
8 I'm not the bankruptcy lawyer, but a bar date order is not of
9 the same type that a statute of limitations is. You can
10 allow a late filed claim. It is sort of an equitable
11 principle that, yes, you impose a bar date order. You can
12 extend the bar date order. You can allow a late-filed claim
13 and under the Huber case, especially, that would allow
14 ratification. So I don't think either one of Mr. Bernick's
15 cases or either one of his line of cases is applicable in
16 this instance. Your Honor, the other thing I would say to
17 you, and maybe this is just a practical problem I want to say
18 to you is that, this issue has now been before you but not
19 decided in all of the other - at least several of the other
20 bankruptcies. It was an issue that U.S. Gypsum filed a
21 motion on, and we were going to argue, and we settled the
22 case. I can't recall if it was a case in the situation in
23 U.S. Mineral, but we settled that case as well. It's also an
24 issue that was brought up by Mogul, same issue. I have
25 authority is a question of whether it relates back or not,

1 and that matter is scheduled now for next Friday in
2 Pittsburgh - excuse me, next Monday in Pittsburgh on the
3 Mogul hearing. I'd also tell you that I am this close to
4 resolving all of our claims in the Mogul bankruptcy so it
5 would still go away. I would urge you to read the briefs
6 carefully. I would urge you to wait until after
7 certification, and hopefully we can resolve it in one of
8 those ways. If Your Honor wants to address it, I'll tell you
9 that the ratification law to me is just overwhelming that we
10 cited to you already.

11 THE COURT: Well, isn't there a practical solution.
12 Can't these three entities simply move to file a late claim
13 and to the extent that their basis - I don't know what their
14 basis would be, but if they have some basis that, you know,
15 they didn't get the notice, that they thought you were
16 representing them but they hadn't given you the authority. I
17 mean, I don't know what it could be, but if they have a basis
18 for filing a late claim, isn't that the solution?

19 MR. SPEIGHTS: Well, that's an alternative, Your
20 Honor. I'm not sure what Mr. Bernick would say if they file
21 a late-filed claim as to what arguments he would make and
22 what different standards might apply, but certainly if Your
23 Honor ruled against me, I would do that. If Your Honor ruled
24 against on class certification, I would do that, and I have
25 no problem doing that now and having both issues decided at

1 the same time and allowing the full factual development
2 dealing with these claimants, because I don't think the - I
3 think I'm right on ratification, but my concern is that these
4 people who want to proceed, not be precluded from proceeding.
5 They are W.R. Grace product ID buildings who have retained me
6 to represent them.

7 THE COURT: Okay, thank you.

8 MR. SPEIGHTS: Thank you.

9 MR. BERNICK: (Microphone not recording) . . . there
10 are two matters that Mr Speights talked about -

11 THE COURT: Mr. Bernick, I can't even hear you let
12 alone the people on the phone, so - If you pull the mike from
13 the witness stand.

14 MR. BERNICK: Oh, oh, oh, here's one here. How's
15 that?

16 THE COURT: That's fine.

17 MR. BERNICK: Good. We have ratification, and I
18 want to distinguish that from the effect given to
19 ratification. Was there a ratification in fact? What effect
20 should be given to that ratification, given the fact that we
21 had a deadline that a lot of people relied upon? Mr.
22 Speights spent a lot of time talking about ratification. He
23 said, Well, there was ratification. I think my cases are
24 right, and he talked a lot about there being a connection
25 that he had with the clients, with the principals. And he

1 even cited this affidavit from Mr. Freeman saying that there
2 was an obligation, so strong was it. This whole argument
3 that deals with ratification doesn't really address the
4 problem that the Court faces. The problem the Court faces
5 is, sure there's a ratification. We know that they have
6 given authorization in writing. The question is, what effect
7 does it have given Rule 3001 and given the agency principles
8 as articulated by the Supreme Court, in the Supreme Court's
9 mindfulness about ratification in cases where there is a
10 definite deadline and other people's rights are affected.
11 So, I'm going to come back to that. That's really the issue.
12 But even on ratification, he said that, Oh, there was an
13 obligation. Well, did Mr. Freeman say there was an
14 obligation because there was a connection where the class was
15 not certified as to Grace? Is the Anderson Memorial class
16 was not certified as to Grace? Did he have - Did Mr. Freeman
17 say, Even though the class was not specifically carved out
18 Grace, did Mr. Speights still have the obligation to lodge
19 claims on behalf of Grace claimants? Anderson Memorial was a
20 South Carolina class. The Court had decided not to certify a
21 class that went beyond South Carolina. Are any of the claims
22 that we're talking about here in the 61 claims, are any of
23 them South Carolina claims? I don't see a one on even that
24 first page. I'm not sure if there are any South Carolina
25 claims. Is Mr. Freeman saying that Mr. Speights had an

1 obligation to people who didn't live in South Carolina under
2 a South Carolina class to file a claim on their behalf?
3 Obligation? And then what about this Court's order. This
4 Court, Your Honor, ordered counsel to seek permission before
5 filing any kind of class claim, any kind of class claim
6 whatsoever. Does the obligation that Mr. Freeman identified
7 trump this Court's order? So I think the whole idea that
8 somehow Mr. Speights can wrap himself in a cloak of
9 authority, given the Anderson class, to prosecuting claims
10 against Grace who is not a certified class defendant or
11 claimants who were not South Carolina claimants, and where
12 this Court had specifically ordered that any effort to
13 proceed on behalf of South Carolina claimants, that is
14 through a class proof of claim, had to be approved by the
15 Court. So, I think that even on ratification, all that Mr.
16 Speights has done is to highlight by bringing into this issue
17 the Anderson Memorial issue, which we didn't do and he did,
18 to simply highlight all the problems that he has with
19 Anderson Memorial to which we're going to turn in a few
20 minutes. But none of this, even if you were to grant that he
21 had ratification, none of that gives rise to the question or
22 answers the question, Well, what effect did it have? Should
23 there be relationship-back, and he says, Well, this is a
24 question. There are cases on both sides. There are no cases
25 on both sides of that question. The only cases that address

1 the question of whether there can be relationship-back where
2 you have the deadline that the Supreme Court described and
3 the rights of other intervening parties affected, the only
4 precedence are the precedence that we've cited, and
5 particularly the Supreme Court's case which Mr. Speights did
6 nothing to distinguish. That was a case where there was an
7 effort after the fact ratification against the deadline and
8 the Court said, No. And then we go back to 3001, and the
9 fact that 3001 in the claim form itself here required the
10 action of a principal. No answer to that. So we got a lot
11 of generalized discussion about ratification, but no specific
12 response to what counts here, which is the effect of
13 ratification and the application of Rule 3001(b) and the
14 Supreme Court's decision in Federal Election Commission. I
15 was given a note that I really have to share. If Mr.
16 Speights is correct about what he is able to do, there would
17 be a good business. You'd get a Schedule F from the debtors
18 and file a proof of claim for each creditor, timely, proof of
19 claim. Then you could wait for the bar date, and for anyone
20 who misses the bar date you would then contact them to say,
21 I've got an answer to your problems, I've already filed a
22 claim on your behalf and now all you have to do is authorize
23 me and I'm your attorney. I don't think that's really what's
24 contemplated. With respect, Your Honor, to the question that
25 you raise, which is late claims, Mr. Speights can always come

1 in on behalf of his clients and make a request for treatment
2 as a late claimant. That's something that's presumably
3 available to everybody, but if that's going to happen, this
4 motion should be granted to strike the claims that were
5 filed, because they should be stricken. If he then has the
6 authority from his clients to prosecute a late claim, we will
7 take up those late claim requests just like any other late
8 claim request and determine whether there's a ground for it,
9 and if they meet the ground, fine. If they don't meet the
10 ground, they don't meet the ground. But right now, that's
11 not before the Court and it's not really appropriate, we
12 think, in responding to the motion that is before the Court
13 to try to negotiate the point where somehow this matter is
14 held on ice until they can go ahead and file the late claims
15 or request for late claims, and then ask that both things be
16 adjudicated at once. If these claims were not properly
17 filed, they should be stricken. If his clients then want to
18 come in with late claims, we'll deal with that on another
19 day.

20 THE COURT: Mr. Speights?

21 MR. SPEIGHTS: I wish I had the vim and vigor of Mr.
22 Lockwood to respond to some of those things. Number one, I
23 handed Mr. Bernick the Freeman affidavit, and he said, I
24 don't need to read it. And then he proceeded to tell you,
25 Did Professor Freeman say this? Did Professor Freeman say

1 that? I don't think so. Professor Freeman has said exactly
2 what Mr. Bernick said in his imagination that Mr. Freeman did
3 not state. Mr. Freeman said, first of all, that we had the
4 obligation for the Anderson putative class, the nationwide
5 class to file these proofs of claim. So, I urge Your Honor
6 to read the Freeman affidavit. I didn't mis-characterize it.
7 It says that we had the obligation to do exactly what we did,
8 a fiduciary duty obligation. Secondly, Your Honor, Mr.
9 Bernick said, Several times the Court has specifically ruled
10 that you had to get permission. That is not the case, Your
11 Honor. What happened was, Mr. Bernick found - I don't even
12 think in his initial brief a discussion with the Court in a
13 transcript, not a ruling, not an order, not something served
14 on people, not in the bar date order, he found a reference in
15 a transcript in which Your Honor suggested that you might
16 need permission and then later on in the same transcript, I
17 didn't know it was coming up today, I don't have it with me,
18 the Court turned and said something else, and in the
19 meantime, Mr. Bernick disagreed with that, and that is the
20 very transcript in which, if you have the whole transcript, I
21 think it was February of some year, Mr. Bernick said we
22 should be governed by the American Reserve case which is the
23 case I relied on after that transcript, filed claims pursuant
24 to American Reserve and pursuant to Professor Freeman's
25 strong and unambiguous advice to me that I should do so.

1 Lastly, Your Honor. Maybe I was too cavalier in dealing with
2 all the cases because the cases are in our supplemental
3 brief. I would urge Your Honor to read the cases. The Third
4 Circuit's case in In Re; Eastern Supply Company, the Fourth
5 Circuit's case in Hager, the Eighth Circuit's case in Boyds
6 all support what we have done here, support ratification.
7 The Third Circuit, the appellant sought dismissal of a
8 bankruptcy petition because the attorney who signed the
9 petition did not have authority. The Third Circuit found
10 that ratification applied. The Fourth Circuit held that the
11 unauthorized filing of a voluntary petition in bankruptcy on
12 behalf of a corporation might be ratified in appropriate
13 circumstances. The Boyds case held. The Eighth Circuit held
14 that the filing of a bankruptcy petition on behalf of a
15 corporation could be ratified. I mean the cases go on and on
16 and on. Your Honor, I didn't spend time on the Supreme Court
17 case because the record will reflect in the transcript that
18 Your Honor saw the distinction between that and our present
19 case, and this is not a situation in which the minority view
20 that's like a statute of limitations, then that might present
21 some problems to some courts but many other. Lastly, Your
22 Honor, I did not see Mr. Bernick try to refute his own case,
23 his own case, First Plus case, which says that you can ratify
24 such an act. It is the claimant itself that can ratify such
25 an act. Your Honor, again I would go back. All of this

1 would go away, potentially, when Your Honor rules on the
2 Anderson matter, and hopefully we're going down that road to
3 have the hearing on the Anderson matter, and there's no
4 prejudice by waiting until that ruling to deal with this
5 issue.

6 THE COURT: Okay. I am going to take this one under
7 advisement because I did read the briefs, but I'm going to go
8 back and take a look at them again, so, I will give you a
9 ruling promptly.

10 MR. BERNICK: I think that brings us to what may be
11 the second to the last issue, which is the Anderson Memorial
12 case, and - Oh, before we reach Anderson, Your Honor wanted
13 us to, I guess, bring up and remind the Court under agenda
14 item 7-B, Romanet iii, there was a stipulation of withdrawal
15 and expungement of 194 Canadian property damage claims.

16 THE COURT: Oh, yes, I am confused as to what I
17 spent most of this morning or I guess earlier this afternoon
18 on based on the withdrawal of the Canadian property damage
19 claims. Are there still some left?

20 MR. BERNICK: Yes, there were something like 200 or
21 thereabouts, 250, and then a whole bunch of them were
22 withdrawn leaving, I believe, 97 claims that were not
23 withdrawn and expunged, and it's those 97 claims that still
24 presented the issue of the Canadian adjudication and that
25 we'll now wrap into the property damage CMO, and Jen, if you

1 could just make sure to mark that down that we need to pick
2 that up in the CMO.

3 THE COURT: What agenda number is the stipulation.

4 MR. BERNICK: The stipulation was 7-B, Romanet iii,
5 and that related to the expungement of the ones that were
6 withdrawn, and there's no action the Court has to take on
7 that. It's simply a report to the Court. Just needs to sign
8 the order, I guess.

9 MR. SPEIGHTS: Your Honor, since neither Mr. Bernick
10 nor Ms. Baer were in Pittsburgh when that matter was heard,
11 that was when Ms. Browdy and I were before you, and it was a
12 product ID objection to all of those claims, and I suggested
13 a compromise, and everybody agreed. Give me 60 days new
14 product ID and I'll withdraw those without product ID, and
15 Your Honor did that, and that's what that stipulation is all
16 about.

17 THE COURT: Okay.

18 MR. SPEIGHTS: And then 97 of the product ID
19 Canadian claims.

20 THE COURT: All right, one second. I will enter
21 that order. I don't have it here.

22 UNIDENTIFIED SPEAKER: Your Honor, I have it.

23 THE COURT: All right, I'll take it then. Thank
24 you. Okay, I did see the stipulation. I was just confused
25 as to why I was going through the Canadian issue when the

1 claims were withdrawn. I didn't appreciate the fact that
2 there was still some left. So all I need is the order, thank
3 you. Okay, I've signed the order that approves the
4 stipulation.

5 MR. BERNICK: Okay. With respect to Anderson
6 Memorial, I think it probably gets divided into two parts at
7 most. Maybe there's only one part, and I suppose it depends
8 upon whether we get back into the reasons why Your Honor
9 asked the questions that you did at the end of the last
10 hearing.

11 THE COURT: What agenda are we on again?

12 MR. BERNICK: This is item number 8 on the agenda.

13 THE COURT: Eight.

14 MR. BERNICK: And Your Honor will recall that - or
15 maybe you won't recall, but we're now going all the way back
16 to a hearing that was held in January of this year. That was
17 the class certification hearing, and there were arguments at
18 that hearing about whether or not the class should be
19 certified thereby permitting the actual prosecution of the
20 class-wide proof of claim. Your Honor made a series of
21 comments about the class certification motion at that time,
22 but then posed a question to be answered, and the question
23 was what had Grace actually done by way of giving notice, and
24 you asked for a report on that. So, we are prepared to make
25 a report on that factual issue. If that takes us back into

1 the matters that were then being heard and what the
2 implications of that report are, then I'm prepared to address
3 that. That is all the events leading up to the hearing and
4 what happened in the hearing and kind of where we are on
5 class, but I don't know that that is something that we need
6 to take up today. I'm happy to do it. Happy to talk about
7 class cert and what Your Honor said at that time about your
8 own observations about class cert, so, we'll do it either
9 way. We can either address the narrow issue and then the
10 broader issue.

11 THE COURT: Let's start with the narrow issue.

12 MR. BERNICK: That's fine, then Ms. Baer is going to
13 address the narrower issue.

14 MS. BAER: Your Honor, given the late hour, I will
15 try to be brief. I do have a binder of all of the filed
16 materials that relate to this. Pretty much everything is of
17 record, but what I'll do is just summarize what occurred.
18 Your Honor, as you might recall, when you entered the bar
19 date order on April 22nd of '02, there were various sections
20 as to what the debtor needed to do and who the debtor needed
21 to give notice to. With respect to asbestos property damage
22 claims, the order provided specifically that good and
23 adequate and sufficient notice of the bar date and all the
24 procedures and requirements was if the debtor served the bar
25 date notice package upon all counsel of record for known

1 holders of asbestos property damage claims. Your Honor, if
2 you also recall that order originally had some provisions
3 that because Grace had indicated they did not have the
4 address of asbestos property damage claimants, we'd be happy
5 to serve the bar date packages on the claimants but we don't
6 have the information. We'll serve their counsel and their
7 counsel has a choice. They can either give us the addresses
8 and then we'll serve their claimants, which in a couple of
9 cases happened, or they can serve their own clients and
10 certify to us that they did so. Later on, the Property
11 Damage Committee came in and had you remove the requirement
12 that they certify that they had given their clients notice.
13 We did not give individual property damage claimants notice.
14 We gave their counsel notice. Your Honor, when we filed our
15 certification of counsel of who we gave notice to, in June of
16 2002, we filed 199,816 actual notice bar date packages that
17 are certified in that notice. Your Honor, where did the
18 information come from? When Grace filed Chapter 11 it had a
19 database, and the database contained all of the names of
20 various types of creditors listed on its schedules. The
21 database was around 400,000 names. The service was only on
22 200,000 because we excepted from the database asbestos
23 personal injury claimants and lawyers, mostly lawyers. Your
24 Honor, the database that Grace used had just about everything
25 on it you could think of: vendors, creditors, litigants, and

1 other lawsuits, co-defendants, environmental claimants and
2 the like. When you look at the certification of counsel as
3 to the 199,000 that were served, it breaks down as follows:
4 112,116 parties were served with just the non-asbestos
5 property damage proof of claim. They were equity holders
6 that may have an interest in the case. In addition, 177,911
7 parties were given actual notice. This was an actual notice,
8 the listing of which is just over 53,000 pages. They were
9 given the bar date notice materials and the non-asbestos
10 proof of claim form. They were not given the asbestos
11 property damage proof of claim form because these were
12 vendors, customers, employees, environmental claimants,
13 parties to non-asbestos litigation. The 9,709 parties listed
14 on Exhibit 7 to the certification of counsel, which is 265
15 pages long, served the bar date notice package including the
16 asbestos property damage proof of claim form. Your Honor,
17 among those 9,700 people who received the property damage
18 proof of claim form and notice package, were the 2002 list in
19 this case, members of the various committees, all residents
20 of Libby, Montana, which, Judge, you had ordered us to do,
21 and all known personal injury and property damage lawyers.
22 We did include, Your Honor, a lot of the, what we call the
23 major personal injury lawyers in that service because we
24 figured that they actually may have some clients who might
25 also be interested in filing property damage claims. If you

1 examine the attachments to the certification, you will see
2 that many of the usual suspects were served, most
3 importantly, Mr. Speights was served. Mr. Dies was served.
4 Ed Westbrook was served. Darrell Scott was served, Ness
5 Notley, Perry Whites, Siber Pearlman, and I could go on. We
6 served lawyers, Your Honor. The lawyers had the
7 responsibility to serve their clients. We do not have their
8 clients' names, we do not have their clients' addresses.
9 Your Honor, subsequently, in March of 2003, Mr. Speights
10 filed, as you know, over 3,000 property damage claims. Among
11 those were 1,010 individual proofs of claim for the purported
12 members of the Anderson Memorial class. He also at that time
13 then filed the two class proofs of claim. When that
14 authority was challenged with our thirteenth omnibus
15 objection, Mr. Speights himself in his response indicated
16 that of the 1,010 Anderson Memorial purported claimants, 62
17 of the individual claims he filed were for known people in
18 the defined class. Two hundred and eighty-five of them were
19 for putative class members where he had express authority
20 either in this case or another case, it wasn't necessarily
21 just the Grace case. Most importantly for the notice issue,
22 Your Honor, 657 of the claims that he filed for putative
23 class members did not respond to his request for express
24 authorization and 396 were for buildings, not claimants, when
25 he was unable to locate any person or entity who owned the

1 building. Your Honor, my point is that we served the
2 lawyers. The lawyers had the responsibility to serve their
3 clients. Mr. Speights filed these proofs of claim. He
4 apparently made the attempts to contact his clients, and he
5 himself had great difficulty with the information he had
6 contacting over the majority of the people that he indicated
7 were the Anderson Memorial putative claimants now I guess he
8 thought we should have served. Your Honor, that is
9 essentially what we did in the bar date notice program. Your
10 Honor, the point and the whole debate with respect to serving
11 counsel, they had the responsibility to serve their clients.
12 It was they who insisted on it.

13 THE COURT: Yeah, they did insist on it, and the
14 only reason I removed the requirement for the certification
15 was because of the argument that they're officers of the
16 court and they said they were going to do it, and they should
17 do it, but at this point in time, maybe I need to go back and
18 have them file the certifications because if in fact there is
19 some in quote, "known creditor" out there and the attorney
20 should have made service and didn't, I don't know that that's
21 the debtor's problem but perhaps the attorneys may need to do
22 something about it. So, Mr. Speights?

23 MR. SPEIGHTS: I'll come back to this point, but
24 just so I won't forget it, Your Honor, it strikes me as the
25 last two arguments have been contradictory about the debtor,

1 far be it for a lawyer to make a contradictory argument, but
2 five minutes ago, Mr. Bernick was arguing that I had no
3 authority to representing any of these people, and one minute
4 a go Ms. Baer was arguing that these were my clients, and
5 therefore, it was my obligation. I want to come back to that
6 point, but there is a contradiction there which seems to me
7 to be pretty obvious.

8 THE COURT: Then if you didn't represent them, then
9 you had an obligation to get back to the debtor to say you've
10 sent me a package for this number of people, and I don't
11 represent them so, here are their addresses and go serve
12 them.

13 MR. SPEIGHTS: They didn't do that, Your Honor.
14 They didn't send me packages for all of these people, and
15 therein lies the problem. Let me go back. For all of these
16 putative class members, I don't believe they sent me
17 packages. Let's go back to how we got started on this.
18 First of all, I want to say up front, because I didn't make
19 it clear before, that this is not an issue that somebody has
20 filed a motion attacking the bar date order. This is not a
21 matter in the context of class certification we have raised
22 the issue that you have to do your publication notice again.
23 This is an issue about whether a select group of PD claimants
24 should have gotten and should now get direct notice or that
25 select group of PD claimants who did not get direct notice

1 should be taken care of by the Anderson class. It all came
2 up because Grace in its brief in opposition to the motion to
3 certify acknowledged and correctly so acknowledged that one
4 reason to certify a class action in Bankruptcy Court would
5 assist the Bankruptcy Court in the development of a plan of
6 reorganization. And there are many ways you can do that, but
7 one of the ways would be that if there's some question about
8 whether everybody got adequate notice, and if there was that
9 legitimate question, then there would be the argument that if
10 you certify Anderson and the resolution of Anderson will take
11 care of that potential problem of a group of people who did
12 not.

13 THE COURT: There shouldn't be a potential problem.
14 If you have an obligation on behalf of the Anderson putative
15 class to file proofs of claim on their behalf because of this
16 ethics opinion, why don't you at least have the same
17 obligation to notify them of the fact that there's a bar date
18 and to make sure that they get the information concerning the
19 bar date and the actual notice. I mean, the contradiction, I
20 think, is you can't on the one hand tell me you have a
21 fiduciary duty to go part way but not the whole way with
22 respect to the notice issue.

23 MR. SPEIGHTS: Your Honor, maybe our disconnect is
24 that even if we have a duty and even if we attempt to find
25 these people, I don't think our duty to do that as putative

1 representative to file a class action and represent them in
2 that way, eliminates their obligation to give notice to these
3 people. They didn't want to give notice. Their position is,
4 they didn't know who these people were. They were not
5 reflected in their records, and they had to -

6 THE COURT: Right.

7 MR. SPEIGHTS: - and they would not have given
8 notice.

9 THE COURT: Right.

10 MR. SPEIGHTS: Right, and I say, and I believe I can
11 prove to Your Honor at the appropriate time, I believe that
12 they did have records. I believe that there is a strong
13 suggestion that they had the ability to directly notify these
14 people, number one, much more so than I did, but even if it
15 was the same, it would be directly from them to the people as
16 a debtor. These are people I don't know. I hadn't met.
17 Somebody should give them notice, and it could be both of us.

18 THE COURT: But you - Well, look, I don't know how
19 the debtor, unless all of the individuals who are in this
20 putative class have been identified somewhere, then I don't
21 know how the debtor could know who the putative class is.
22 Generally speaking, one reason that you may get certification
23 of a class is because you don't know all of the members at
24 the time that the class is certified, and this class wasn't
25 even certified yet. So, how could the debtor possibly know

1 who all of the potential claimants in a class action that
2 wasn't certified could be? The best person or people likely
3 to know who those claimants are, are the lawyers who profess
4 that they want to represent them in the event that there has
5 been some action in which they too can give notice. If you
6 don't know who they are, Mr. Speights, and the debtor doesn't
7 know who they are, they're obviously not known creditors.

8 MR. SPEIGHTS: But, Your Honor, that's the point.
9 I'm not conceding that the debtor does not know. I have -

10 THE COURT: Well, do you want to do discovery to see
11 what the debtor -

12 MR. SPEIGHTS: That's the issue I'm heading for.

13 THE COURT: Okay.

14 MR. SPEIGHTS: I noticed a deposition a year ago,
15 just a 30(b)(6) deposition to find out what they knew, and
16 see whether they gave notice to these people, and we'll come
17 back here, and you know, I've been here for four years and
18 haven't taken a deposition.

19 THE COURT: The debtor is admitting that it did not
20 give notice. It gave notice to the attorneys.

21 MR. SPEIGHTS: But what it didn't - what it has not
22 told you is is what records they have. We now have the
23 benefit of the opinion that came out the other day by Judge
24 Buckwalder (phonetical) which rejects what Grace said was a
25 limit of its obligation, which was to essentially just look

1 at my records.

2 THE COURT: No, I think it affirms that obligation.

3 MR. SPEIGHTS: I think that it has that obligation
4 to do so, but it also - I mean the opinion speaks for itself.
5 I like the language of that opinion, I can live with
6 certainly for this matter. I think Grace - my deposition is
7 simply this, Your Honor, that, and again, it's the only
8 deposition I tried to take in this case since it was filed,
9 is to get the 30(b)(6) of the person most knowledgeable about
10 what records Grace had which would enable it to give direct
11 notice to property damage building owners who have Grace's
12 product in their buildings, and I believe Grace has a wealth
13 of information more so than I do.

14 THE COURT: Well, they apparently got a
15 certification that indicates that they had a database, that
16 they went through the database, that they took out the
17 entities with respect to the personal injury claims, and they
18 pretty much served everybody else. Now, I mean, there's a
19 certification. If I can accept the certification of counsel
20 that they served their clients, I ought to be able to accept
21 the certification of Grace's counsel that that's who they
22 notified.

23 MR. SPEIGHTS: Your Honor, I'm not challenging Ms.
24 Baer's certification as to what she believes; okay? She has
25 a client. They know what documents they have. I don't know

1 that Ms. Baer knows. She's not the deponent. She's not the
2 person with first-hand knowledge, but she certainly knows who
3 she notified.

4 THE COURT: Well, I know but I think -

5 MR. SPEIGHTS: But for example -

6 THE COURT: - the bigger problem, Mr. Speights, I
7 don't know how on the one hand you tell me you've got an
8 ethical obligation to file a proof of claim on behalf of
9 somebody and at the same time, don't have an obligation to
10 notify them that there's a bar date that means that they have
11 to file a proof of claim.

12 MR. SPEIGHTS: Your Honor, even if you say that's
13 the case; okay? Even if you conclude that that's the case
14 that I had - when I filed the proof of claim, they say
15 they're not my client, and I didn't have to have
16 authorization. So, I mean, it's a circular argument.

17 THE COURT: But that's because at the time that they
18 made this service, you are of record as representing certain
19 clients. When you filed the proof of claim without the
20 authority, it then becomes clear that maybe you didn't have
21 the authority to represent them, but the apparent authority
22 was certainly there. That's the issue. So, if you didn't
23 make service and didn't tell the debtor that you didn't make
24 service, then how's the debtor to know who the people are who
25 weren't served when the order told counsel to serve their

1 clients?

2 MR. SPEIGHTS: When the debtor served me with the
3 order saying, you serve your own clients, I don't believe the
4 debtor had any knowledge, based upon what they've said in
5 court, that I was going to attempt to file claims on behalf
6 of or contact members of this putative class. They were back
7 on this song and dance at that time. There were only seven
8 cases in America; okay? And therefore, they sent me a claim
9 form for Anderson Memorial Hospital and they wanted to do the
10 same for my California building. They didn't even know I
11 represented the University of California and Cal State. That
12 was not on their radar screen. But they knew -

13 THE COURT: But that's not the point. Go ahead.

14 MR. SPEIGHTS: What they though, when they made this
15 decision not to serve building owners, not to serve people
16 with their product -

17 THE COURT: They didn't make a decision not to serve
18 building owners. They made a decision to serve building
19 owners but in some instances they didn't have the
20 identification of who the building owners were. They served
21 people that they knew to be counsel for certain building
22 owners, asked counsel either to make the service or to return
23 the package to the debtor with the information as to who
24 should be served and the debtor would do it. I mean, I don't
25 know what more debtor can do.

1 MR. SPEIGHTS: That's what I'm trying to explain,
2 Your Honor.

3 THE COURT: Okay.

4 MR. SPEIGHTS: Here are records of the debtor. This
5 is an invoice of the debtor's, from their files.

6 THE COURT: The debtor doesn't have to go through 25
7 years worth of invoices, or I'm not sure how long Grace has
8 been in existence. I'm sure for at least or close to a
9 hundred years, probably not that far. They don't have to go
10 back through a hundred years' worth of invoices to see what's
11 been paid or not paid.

12 MR. SPEIGHTS: But, Your Honor, this is a - it's not
13 a question of paid or not paid. This is an invoice showing
14 that the monokote product is in the Dodge County Hospital in
15 Eastman, Georgia. That's a building. That's where its
16 product is. They have direct knowledge of that. It's in
17 their files. It may be, I don't know until I take my
18 deposition, it may be part of some data that's been
19 computerized. There may be somebody, and it's hard for me to
20 imagine that somebody doesn't know, where that product is
21 placed. Not just for the property damage litigation in the
22 world, but I would like to know if people are suing me for
23 mesothelioma where my product was placed. We've got tons -
24 not tons, we've got a lot Grace invoices with specific
25 buildings where their product was placed.

1 THE COURT: Didn't we address this when I did the
2 notice issue. I think this is something that I've heard
3 argued a couple of years ago.

4 MR. BERNICK: If I just can be heard for a moment on
5 some of what Mr. Speights has said . . . (microphone not
6 recording).

7 MR. SPEIGHTS: May I finish this, Your Honor.
8 There's not a moment with Mr. Bernick.

9 THE COURT: Yeah, finish, because, frankly, folks, I
10 would like to get through the agenda, but I'm getting to the
11 point where I'm getting tired too, and I'm sure all of you
12 are, so I want this one wrapped up in ten minutes so we can
13 get to number 4 and get finished tonight, by nine o'clock.
14 We're out of here by nine o'clock. So, let's go, folks.

15 MR. SPEIGHTS: Your Honor, I have additional types
16 of records. I've got letters from building owners with the
17 monokote product directly to Grace identifying their
18 buildings. I've got in addition to the - and I can have all
19 these marked, but I'm not sure that you take evidence at this
20 type of hearing, but -

21 THE COURT: Well, I'll take them if you want to
22 submit them, but, frankly, I'm not sure that this is the time
23 for an evidentiary hearing. If I need one, I probably need
24 to schedule it, but I'm sure I addressed all of this in
25 setting the bar date notice. This is old news. I've heard

1 this before.

2 MR. SPEIGHTS: Well, I don't know, Your Honor,
3 because I didn't argue the bar date notice, but in addition
4 to the invoices and the letters they have computer readouts
5 with a great deal of information about where their product
6 was sold, and then they go to -

7 THE COURT: But the placement of their product does
8 not a claimant make. The building isn't a claimant in the
9 case. So, who owns the building or whether the product was
10 remediated or anything that may have happened since the date
11 of sale does not mean that the debtor knows who the creditors
12 in the case are.

13 MR. SPEIGHTS: I believe, Your Honor, that they have
14 an obligation. If they know where their product is - Let's
15 take the easiest example. I know that monokote fireproofing
16 is in the DuPont Hotel. I don't think it is and I hope it's
17 not because I stay there sometime, but if they know that
18 monokote fireproofing is in the DuPont Hotel, I think they
19 have an obligation to send the notice to the DuPont Hotel and
20 that might be the crux of the problem. And in addition, Your
21 Honor -

22 THE COURT: But if they do that, under most rules of
23 service, the thing is either going to get bounced back or
24 it's going to be rejected as improper service because it's
25 not directed to the appropriate custodian or officer. Now,

1 you know, Mr. Speights, they can only do what's reasonable.

2 MR. SPEIGHTS: But they didn't do any of this, Your
3 Honor.

4 THE COURT: But they did.

5 MR. SPEIGHTS: They gave it to a few lawyers. They
6 were only seven cases filed at the time. They didn't go
7 through any of that data, again without the discovery, I
8 don't know how they made these decisions, but they tell me in
9 their brief on the certification, Mr .Speights has no record.
10 He can't show where we failed in any way. They go on and on
11 and on about how I can't show. Well, I just want to
12 establish a factual record at this point. Maybe the factual
13 record will be such that I'll have to come to Your Honor and
14 say, Frankly, Your Honor, this is what they did and I can't
15 refute it. But I believe that and I believe in good faith
16 that W.R. Grace has a record of where its product went and at
17 least, even if Your Honor disagrees with me, let me make my
18 factual record so that, you know, if we end up before Judge
19 Burkholder, like the last people did, I can show this is what
20 they should have done, Your Honor, and they didn't even
21 attempt to do it, because to my knowledge of all these
22 invoices and all these computer readouts, and all of these
23 advertisements, which I didn't even discuss where their
24 product is shown in buildings. To my knowledge they didn't
25 attempt any way to give direct notice to these people, and I

1 think they should have, but in order to determine that, I'd
2 like to know what records they actually had. If they've got
3 a computer database, if they've got, you know, Mr. Fink is
4 down in the first row, I wake up there, because he's been a
5 Grace man for years. He might be a deponent, but he has that
6 knowledge. I don't have that knowledge.

7 THE COURT: Well, I think there's still a disconnect
8 between buildings, sending product to a place, and knowing
9 who the creditors are.

10 MR. SPEIGHTS: But in some instances, Your Honor -
11 you may draw that line, but in some instances they know who
12 the building owner is or was. Some of the letters go into
13 the 70s and 80s of who the building owners are, writing them.
14 Dear Grace, I've got this asbestos in my building, what
15 should I do about it, and Grace responds and they don't give
16 notice to that creditor, and therein lies, I think, the
17 crucial issue of which one deposition one day and we can come
18 back before you, and we'll have a record and you can decide
19 it, Your Honor. That's the only discovery I've sought other
20 than asking, now here's a motion, I've asked you to lift the
21 stay to get some South Carolina documents, but other than
22 that, you know, we want to argue the certification issue.

23 THE COURT: Mr. Bernick.

24 MR. BERNICK: This is a - I've got three minutes,
25 but I think that's all it will take. This is a frivolous

1 issue, Your Honor. We went through a process and the process
2 was driven by legal rules. The process was to establish a
3 bar date, and in connection with the bar date process, we had
4 a notice program that was fully disclosed to the Court and to
5 all parties, and the notice program was driven by actual
6 notice and constructive notice by publication, and all we
7 were required to do was to follow the rules that specified
8 when you have to give actual notice and when you have to give
9 constructive notice by publication. As Your Honor properly
10 has observed, it is not required to give actual notice based
11 upon invoices and analyses. You give actual notice when you
12 actually have notice of the claim being made or the claim
13 existing and being ripened and being assertable. Whatever
14 the standard is, we briefed it before. So we segregated out
15 the people who were going to get actual notice and the
16 remainder were going to get constructive notice through
17 publication. And we even went one step further, which is to
18 say, We'll ask the lawyers to make inquiry, and that would
19 really kind of come out of this population, that is people
20 who would otherwise only get constructive notice. This
21 matter was fully litigated. All the facts that Ms. Baer
22 recited were all out there. The notice program was
23 transparent. Ultimately the notice program was approved, it
24 was approved as complying with the actual requirements of the
25 law. The bar date was appealed, but the adequacy of the

1 notice program was not appealed. It's been decided in this
2 case. It's final. That's it. There was no appeal. There
3 was no issue with regard to the adequacy of the program. So,
4 we now have - the lawyers had an obligation going forward
5 under our program to make inquiry in order to supplement
6 publication. They came in and said, No, they didn't want to
7 have that obligation. Maybe they were going to go do it on
8 their own, but they didn't want to have the obligation and in
9 the face of that Your Honor said fine, we said fine. So what
10 happened? The lawyers went forward and they made their
11 contacts and they pounded the pavement and they went out and
12 solicited after-the-fact authority. They went after everyone
13 they could possible think of. They have yet to come forward
14 to say that they actually found somebody who should have
15 gotten actual notice. They have yet to say, Gee, you know,
16 even after the fact we now know that there's somebody that
17 Grace had notice of and should have given actual notice to.
18 That's not even been demonstrated, and in fact, even if they
19 could it would be 20/20 hindsight. It wouldn't even go to
20 the adequacy of the program because the adequacy of the
21 program is determined at the time. It's not determined with
22 20/20 hindsight. So, even today they don't have some huge
23 population of people that they say should have gotten actual
24 notice and didn't. They want to simply argue that way back
25 then when the bar date program was established, we were

1 obliged to give actual notice to a bunch of people who are
2 reflected on invoices or sites. That's just a revisiting of
3 the argument that they could have made then. That day has
4 passed. So, the reason I say it's frivolous is that they
5 could have argued this at the time. He could have come in
6 here with the invoices and the collections and made exactly
7 the same argument. He would have been wrong but he could
8 have made the argument. He didn't. So we went and did the
9 program. So, now, about how the program should have been
10 done differently and I want to conduct discovery, I just
11 don't know what planet we're on. This is *res judicata*. It's
12 been decided in this case, and the only reason he's coming in
13 and doing that is he wants to sit there and bootstrap to his
14 class. That's the only reason that we're here is that he now
15 thinks that the only function that the class can serve is to
16 cure inadequacies in a notice program that he never
17 challenged for its adequacy. Your Honor, we would ask that -
18 we made the report in the status report to the Court, but we
19 think that the class certification motion was argued in
20 January, was before the Court then. Your Honor actually went
21 through an analysis of the - there's now a continuing
22 distortion, kind of like, it's a ripple effect because they
23 still want to pursue or he still wants to pursue the class
24 certification, and all this is, is a back door consequence of
25 the fact he still wants the class certified. It's not really

1 a bona fide argument that goes to the adequacy of the
2 program.

3 THE COURT: Well -

4 MR. BERNICK: I'll also observe - I'm sorry, one
5 last thing. In January you asked that you be furnished all
6 of the orders and transcripts relating to Anderson Memorial.
7 I don't know that that's actually been done, but we have now
8 looked at the files and we can tender to the Court and it's
9 very plain, it's plain as day, a letter was written from the
10 Anderson Memorial judge to Mr. Speights and it specifically
11 told him to draft the final class certification order, the
12 one after Grace was already in bankruptcy, told him to draft
13 it because, he said, You can file your briefs because I think
14 your briefs are correct. So, essentially, the order that was
15 entered in the Anderson Memorial case certifying the class
16 after the fact apparently at least as we can see from the
17 letters was actually drafted or at least proposed draft for
18 the Court in response to a letter from the Judge by Mr.
19 Speights and then tendered to the Court. We don't know if
20 there were any edits made or how that worked, all we know is
21 that there's the letter there.

22 THE COURT: Well, I know, but I mean if the Court
23 orders you to draft an order, Mr . Bernick, are you not going
24 to do it?

25 MR. BERNICK: Well, it's a whole opinion. It's not

1 just the order, it's a whole opinion. And here's the
2 significant part of it, is that the letter from the Judge
3 specifically specified they'll be certified as to the
4 remaining three defendants not including Grace.

5 THE COURT: Right.

6 MR. BERNICK: So Grace was out of the picture, and
7 then when you go to the final opinion that was issued, you
8 can glean that Grace was not supposed to be there, you can
9 glean it from the opinion, but somehow the clarity that
10 specifically excluded Grace is not quite as clear in the
11 final opinion as it was in the letter that the Court sent to
12 Mr. Speights. Now, I'm not making any accusations. I think
13 we're in for a whole bunch of reasons, but the fact is that
14 the clear intent of that Court was to exclude Grace from the
15 Anderson Memorial case and that that was known, it was known
16 to counsel in 2001, and yet, we're now sitting here still
17 dealing with the consequences and argument that says that
18 somehow the Anderson Memorial case is alive and well with
19 respect to W.R. Grace. We don't think that's accurate. We
20 will furnish the orders to the Court that we have gleaned and
21 anything that Mr. Speights has in his files, I think, would
22 be important also to furnish to the Court so the Court's
23 record is complete on what actually happened in connection
24 with the Anderson Memorial case.

25 THE COURT: All right, well, why don't all of you

1 put together all of your documents and submit them in a
2 binder. I did get some documents from Mr. Speights awhile
3 back. I don't recall now how long, but that I believe had
4 the Judge's letter and the opinion attached to it. I have
5 seen that, so I'm aware that the Judge indicated that Grace
6 should be excluded, but my recollection is that it was
7 excluded because the debtor filed bankruptcy not because
8 there was some ruling on the merits that indicated that Grace
9 should not be included in that class certification.

10 MR. BERNICK: The two were tied together, that is to
11 say, clearly the Court could not include Grace, but remember
12 the pre-bankruptcy order was ex parte and done on the heels
13 of the press release. The only order finally certifying a
14 class in the Anderson case was the order that was issued in
15 July, and pursuant to a letter that said, it should exclude
16 Grace. So, the representation that there was a certified
17 class as to Grace in the Anderson Memorial case is not
18 correct.

19 THE COURT: I agree. There is no certified class as
20 to Grace in the Anderson case. I agree.

21 MR. SPEIGHTS: Your Honor, that's just simply not
22 correct. I mean, Your Honor - I mean, we went over this a
23 year ago. The case was certified as to Grace. He challenges
24 the circumstances of the order. It was not - after the order
25 was signed there was a hearing where now federal judge, Kevin

1 Castelle (phonetical) attended and he kept his order in place
2 as to Grace. He excluded it. This idea of -

3 THE COURT: Well, I don't have those documents, but
4 if it was entered post-petition -

5 MR. SPEIGHTS: It was not. It was not entered post-
6 petition, Your Honor. There's an order as to Grace
7 certifying the class -

8 THE COURT: All right, somebody has to get me the
9 documents -

10 MR. SPEIGHTS: And I have sent them to you and I'll
11 resend them to you, but, Your Honor, I know it's ten minutes
12 to nine, but gracious, we have to be as lawyers somewhat
13 accurate in what we tell Your Honor. I mean, the order - the
14 letter from Judge Hayes was discussed last August when I came
15 here, thoroughly went over. The fact that Grace was
16 certified before was discussed then. More importantly, Your
17 Honor, Mr. Bernick has set up here and said, They never
18 appealed the order. They never appealed the order.

19 MR. BERNICK: The notice program.

20 MR. SPEIGHTS: They never appealed the bar date
21 order.

22 THE COURT: No, he said they did appeal the bar date
23 order.

24 MR. SPEIGHTS: And you know what happened to that,
25 Your Honor. Judge Wolin would not consider that and that's a

1 matter of a question of whether it was premature to consider
2 that, so the Committee did try to do that, but I really stood
3 up to say one thing, until Mr. Bernick started mis-citing
4 what happened in South Carolina which I obviously know what
5 happened down there. What he said was, and I wrote it down,
6 Mr. Speights did not demonstrate - that's what he said, did
7 not demonstrate that we did not give notice to somebody we
8 should and therein is the only issue that I think needs to be
9 decided today, whether I can have the most basic discovery,
10 the deposition to demonstrate what they did and what they
11 didn't do. Judge Burkholder in his opinion says, Further
12 this Court is guided by - is it Chematron Kematron one court
13 statement that the reasonably ascertainable standard requires
14 an analysis of the specific facts of each case, and I just
15 want to get the basic facts on that narrow point, and I
16 noticed a deposition a year ago.

17 THE COURT: But it should have been done in
18 connection with the bar date notice and the notice program.
19 I mean the time to raise an issue as to whether the bar date
20 notice and the notice program was adequate was at the time
21 that I was considering it, not now.

22 MR. SPEIGHTS: But, Your Honor, of course the
23 Committee was on that position, and I know I'm on the
24 Committee, and I know it's difficult to see that I have two
25 hats on my own out here, and the Committee takes positions

1 for everybody, and the Committee tried to appeal the bar date
2 notice, but forgetting all that, if that is a problem with
3 the bar date notice whether somebody raised it then or not,
4 if somebody did not get adequate notice and comes in here and
5 tries to file a late claim -

6 THE COURT: Yes, and if somebody raises that they
7 didn't get actual notice and tries to file a late claim, then
8 I'll probably have to find out why they didn't get notice and
9 whether they're really creditors at the time, but I don't
10 need to do it in a vacuum. I don't have anybody here asking
11 me to file a late claim.

12 MR. SPEIGHTS: But, Your Honor, what you do have is
13 a debtor saying, Mr. Speights can't prove that it should have
14 given notice to one claimant, and hypothetically, I might be
15 right, Your Honor, suppose you find out -

16 THE COURT: You should have raised it at the time.
17 This bar date program was what? Three years ago? I mean, I
18 can't reopen issues that have been adjudicated for three
19 years after a notice program and millions of dollars have
20 gone out.

21 MR. SPEIGHTS: Your Honor -

22 THE COURT: The time to determine whether the debtor
23 did what the debtor was supposed to do was when the debtor
24 came in and said, Look, this is how we propose to go forward
25 with this. We're going to search these records. We're going

1 to give this notice. Is that enough? And I said, Yes,
2 that's enough. I didn't have any contrary evidence. The
3 Committee didn't raise any contrary evidence that indicated
4 that the debtor was missing actual creditors.

5 MR. SPEIGHTS: Well, Your Honor, all I need to do is
6 to come in here with one late filed claim -

7 THE COURT: Fine, come in.

8 MR. SPEIGHTS: And I get all this discovery even
9 though all that happened then.

10 THE COURT: You get discovery as to that claimant,
11 that's correct. So come in with a late filed claim, and
12 we'll see whether somebody exists that didn't get it, didn't
13 get actual notice.

14 MR. SPEIGHTS: And the difference is - and we'll get
15 it and we'll get the truth of what happened then on my late-
16 filed claims, but the issue now is they're taking the
17 position vis-a-vis the Anderson certification that they did a
18 perfect job, and Mr. Speights can't refute it, and I want to
19 refute it.

20 THE COURT: Okay, with respect to the Anderson
21 certification, whether it was pre- or post-petition, was
22 there ever a list of who was included within that class
23 action?

24 MR. SPEIGHTS: The certification at the time was as
25 to South Carolina buildings. The putative class action is

1 for non-South Carolina buildings. There was not a list of
2 who was in except by definition.

3 THE COURT: Well, then it doesn't make anymore of an
4 actual notice for the debtor. The debtor certainly doesn't
5 have to notify every single building in South Carolina and go
6 to, I don't know, every post office, every yellow book, every
7 internet site and find out where every building in South
8 Carolina is to give notice. That's certainly not required.

9 MR. SPEIGHTS: But, Your Honor, I'm not talking
10 about South Carolina. I'm talking about here, the putative
11 class action outside of South Carolina -

12 THE COURT: Fine, multiply that by 49.

13 MR. SPEIGHTS: But, Your Honor -

14 THE COURT: The debtor doesn't have to do that.

15 MR. SPEIGHTS: - it's not a question of going out
16 and finding A, B, and C. Suppose the discovery points out -
17 I'm looking at the clock, and I haven't got an answer,
18 suppose the discovery points out they hit button and all of a
19 sudden they've got the addresses of building owners with
20 monokote fireproofing in it.

21 THE COURT: Mr. Speights, there are so many what ifs
22 under that scenario. When was the last time that monokote
23 was put into a building?

24 MR. SPEIGHTS: In this country, July 4, 1973.

25 THE COURT: Okay. So the last building owner that

1 the debtor's records could possibly show who had some
2 knowledge of the monokote is back it 1973. If the debtor
3 doesn't have an ownership interest in those buildings, how
4 would the debtor have any indication whether the building was
5 sold, transferred, remediated, knocked down, remodeled,
6 whatever. The debtor doesn't have to go through an
7 unreasonable search to figure out -

8 MR. SPEIGHTS: We're not even at the -

9 THE COURT: - claims that were 25 years old at the
10 time that the case was filed, if the existed at all?

11 MR. SPEIGHTS: Let me answer that question, Your
12 Honor. First of all, you're assuming it doesn't have. I
13 don't assume that. I want the discovery to show that. Just
14 the fact that it was supplied there doesn't mean it doesn't
15 have continuing knowledge through letters and advertisements
16 and knowledge, but in addition, Your Honor, something I
17 haven't even mentioned yet, the debtor knows that it's been
18 sued in this 100,000 personal injury lawsuits, and people
19 have testified about their exposure to product in various
20 buildings and various sites, maintenance workers at buildings
21 maybe as late as 1999.

22 THE COURT: And personal injury people are all going
23 to get a bar date notice and the people who were notified as
24 plaintiff's lawyers got the property damage notice.
25 Certainly you're not expecting the debtor to give notice to

1 personal injury claimants of a property damage bar date?

2 MR. SPEIGHTS: No, I'm saying that they may have a
3 computer readout right now to show where their product is
4 based upon a number of sources including the lawsuits filed
5 against it.

6 THE COURT: Where their product is, is irrelevant.
7 Just because their product is somewhere doesn't mean that
8 somebody's going to file a claim or that they have actual
9 notice of who owns the building in which the product is.
10 There are too many steps missing, Mr Speights. That's an
11 unreasonable burden for a debtor to go through.

12 MR. SPEIGHTS: Your Honor, we don't know what the
13 burden is -

14 MR. BERNICK: Your Honor -

15 MR. SPEIGHTS: Excuse me, Mr. Bernick. We don't
16 know what the burden is until we take the discovery of what
17 they actually know.

18 THE COURT: We do know what the burden is. We know
19 that you're arguing that excluding South Carolina, that as to
20 the other 49 states, there was a putative class action out
21 there that would encompass every building in every one of
22 those states. That's what you're arguing to me.

23 MR. SPEIGHTS: Actually, that's not correct. I'm
24 not saying it does every building in every state. Your
25 Honor, my point is and it's a narrow point. I keep repeating

1 myself. Let's get the factual record by one deposition of
2 what they actually had and their ability to do it. You may
3 disagree with my assertion that they should have given notice
4 to this group of building owners or sub-group. You may agree
5 that, well, maybe for these 25 buildings they should go out
6 with the right notice or should have. I don't know. We're
7 arguing in a vacuum.

8 THE COURT: What I'm suggesting is it's too late.
9 The time to do this was at the time that the debtor filed a
10 motion to approve the bar date program or at the time that
11 the certification with respect to the actual notice came in.
12 It is not time to reopen an issue that this Court adjudicated
13 and has been a final order for three years. That's my
14 concern. I just think it's too late.

15 MR. BERNICK: Your Honor, with respect to the
16 Anderson Memorial . . . (microphone not recording) think
17 there's been so much time extended on . . . about what
18 actually occurred there . . . representations that are still
19 being made today about what the certification was that are
20 made by officers before the Court. We have got for the sake
21 of a record here to come to terms with what those orders were
22 Now, maybe Mr. Speights submitted something. He keeps on
23 talking about a putative class. In 1994, the Judge in the
24 case struck the allegations for class determination for non-
25 residents for the claims that don't arise in South Carolina

1 or where the property is not situated in South Carolina. He
2 just struck it because of the door closing schedule. So,
3 there's no putative class. There's nothing. It's a South
4 Carolina case. Then we have a conditional certification. I
5 have that document. It was ex parte February 2001. I got
6 that one. That includes Grace but it's conditional. I have
7 a letter in May that reads as follows: It says, Please draw
8 an order for my review granting plaintiff's motion for class
9 certification as requested. The order should specifically
10 state that the order affects only the three remaining
11 defendants due to the stay as to W.R. Grace. Please tailor
12 the order in conformity with plaintiff's brief and reply
13 brief. I believe the pertinent issues are dealt with fully
14 and appropriately therein. So, we have the conditional
15 certification. We then have the final certification. The
16 final certification at least as the letter reads was to
17 exclude Grace and if you go to the opinion and order, you can
18 see that it basically does, although it's not as plain as the
19 letter is. Under any set of circumstances, I see nothing in
20 the record to indicate that there was a final order of
21 certification for Grace in any respect.

22 THE COURT: I cannot see a final order of
23 certification as to Grace. Had it been entered pursuant to
24 the letter that was sent from the Judge to Mr. Speights, it
25 would have been post-petition and void, and to the extent

1 that it was not made final, the interim certification goes
2 away when it's not made final. It doesn't exist anymore.

3 MR. BERNICK: Right.

4 THE COURT: Now, it may be reinstated at some point
5 if the bankruptcy's over. I mean, there's a possibility that
6 people could go back and reinstate it, but it doesn't exist
7 anymore. It's not a certification.

8 MR. BERNICK: Okay, and all I'm saying - and that's
9 how I look at these documents, but Mr. Speights got up and
10 made a representation yet again today that it was certified
11 pre-petition as to W.R. Grace and that there is some other -
12 we just ought to get past this so we don't keep on having
13 this debate.

14 THE COURT: I do not - Mr. Speights did send me
15 these documents. I apologize again, I don't recall when, but
16 I have seen these documents. I have looked at these orders.
17 There is no final certification as to Grace, and the
18 conditional one at this point in time is irrelevant because
19 it was not finally certified. So - And as to the putative
20 class, I agree that the Judge struck all of the non-South
21 Carolina entities from the class that the Judge did certify,
22 so even if there were conditional certification as to Grace,
23 it's only as to South Carolina defendants at this point in
24 time.

25 MR. BERNICK: Thank you.

1 THE COURT: Okay. I do not see a need for a class
2 proof of claim, Mr. Speights, because it appears to me at
3 this point the notice program was appropriate, the bar date
4 order has passed, the claimants who received the notice
5 either actual or constructed had an obligation to timely file
6 proofs of claim. They are filed of record. The debtor has
7 been filing objections to them, and we're getting through
8 that process. I don't see how a class proof of claim is
9 going to assist anything at this point in time because all of
10 the entities should have received notice either actual or
11 constructive in sufficient time to file a claim. If I am
12 incorrect, and there are entities out there who would have
13 filed a proof of claim had they had actual notice and there
14 is some evidence that the debtor knew about those creditors
15 and should have given actual notice, all of which is
16 hypothetical at this point because no one has filed a late
17 claim, then I'll consider it as to each of those individual
18 claimants whether some additional notice and/or late claim is
19 appropriate, but I don't see a need for class certification.
20 The bar date is passed, and we're down to, I don't know, 600
21 and some claims and based on where we started that's a
22 manageable number in this case.

23 MR. SPEIGHTS: Your Honor, I know it's 9 o'clock,
24 and I know we're all tired. That matter wasn't even on the
25 agenda. I mean I came here to argue - I didn't even bring my

1 class certification stuff. Your Honor, when we came up with
2 class certification before, and I could point out some errors
3 in what Mr. Bernick said down in South Carolina, but I wasn't
4 going to stand up and say that will go for another day. Your
5 Honor said, you know, in a class certification, before I get
6 to that, I had this narrow issue, I want you guys to address.

7 THE COURT: Well, I thought they were encompassed in
8 the same place, Mr. Speights. If there's some other issue, I
9 am basing this on the notice program.

10 MR. SPEIGHTS: That's just one argument on behalf of
11 class certification and everybody held back, and I served my
12 notice of deposition, and Ms. Baer filed her stuff about what
13 a great notice program it was, et cetera, et cetera, and I
14 just want my day in court to argue the class certification
15 because that's not on the agenda.

16 THE COURT: Fine, I will give you your day in court
17 for any issues other than those related to this notice
18 program -

19 MR. SPEIGHTS: I understand that.

20 THE COURT: - with respect to the class
21 certification. I will not enter a final order with respect
22 to this now because to the extent that you want to do an
23 appeal, frankly, I think you ought to just have one
24 opportunity for it all, but you'll know in advance that even
25 if I certify a class it will not be based on inadequate

1 notice.

2 MR. SPEIGHTS: I understand that and that's what you
3 said that you wanted to look at this issues as a discrete
4 issue, and I understand I lost on that issue tonight, and I
5 understand the Court's ruling.

6 THE COURT: All right.

7 MR. SPEIGHTS: But I do want to be heard on the
8 other. Thank you, Your Honor.

9 THE COURT: All right, that's fair enough.

10 MR. BERNICK: Your Honor, I know that - I know
11 better than to argue against Your Honor's flexibility and
12 willingness to hear argument and to consider all sides. I'm
13 familiar with that from years of being here, but Your Honor
14 seemed a little bit uncertain about what the history was. We
15 have briefed class certification.

16 THE COURT: I know, Mr. Bernick.

17 MR. BERNICK: We have argued - I have got the
18 transcripts from January where you said at that time, you
19 didn't see a basis for there being class - and only to carry
20 on, this was a tail carry-on clean-up issue, and now we're
21 going to have a new round - But, Your Honor -

22 THE COURT: If there are additional issues, Mr.
23 Bernick, I'm going to give Mr. Speights his day to argue
24 whatever the additional issues are. So, folks get a
25 scheduling order and tee it up and put it on an appropriate

1 agenda, but what I am not going to revisit, please do not re-
2 include anything about the notice program. I've made my
3 ruling, and I will incorporate it into a final order when I
4 hear the rest of your arguments.

5 MR. BERNICK: But, Your Honor, at this point at
6 least go back and take a look and see - there were briefs
7 that were filed. It's one thing if we have another argument.
8 It's another thing if we have another round of briefs, I
9 mean, I don't -

10 THE COURT: Tell me when and where the briefs were
11 filed.

12 MR. BERNICK: There were briefs that were filed in
13 connection with the argument in January. We'll supply the
14 information to the Court by letter, and we'll send a letter
15 to Mr. Speights as well, that this was -

16 THE COURT: I think it would be preferable if it's
17 not too much of a burden for you to put it together in a
18 binder. Undoubtedly I do not have binders left from January
19 hearings.

20 MR. BERNICK: We will put it together in a binder
21 and then if Your Honor will set argument, we'll argue at any
22 time that the Court feels is appropriate.

23 THE COURT: Okay. I think you folks can pick a
24 schedule, put it together in a binder, pick a schedule, put
25 it in whichever binder you want to argue the issues, but this

1 is it, folks, I'm not hearing any more about class
2 certification after the next issue.

3 MR. BERNICK: Can we put it down for the - September
4 11th?

5 THE COURT: You and Mr. Speights can agree -

6 MR. BERNICK: We'll talk about that.

7 THE COURT: - on it, and whenever you want to put it
8 in, I will hear it.

9 MR. BERNICK: Does Your Honor want to turn to the
10 famous number 4?

11 THE COURT: Yes, I do because counsel have been here
12 and I want to get this finished.

13 MR. BERNICK: If you'll excuse me, Your Honor, I
14 need to go use the facilities here, I'm sorry.

15 THE COURT: Maybe everyone needs that opportunity.

16 MS. BAER: Your Honor, that would be appreciated.

17 THE COURT: Yeah, a five-minute break, but that's it
18 so we can get this finished at least.

19 (Whereupon at 9:03 p.m. a recess was taken in the
20 hearing in this matter.)

21 (Whereupon at 9:09 p.m. the hearing in this matter
22 reconvened and the following proceedings were had:)

23 THE COURT: . . . eat, and I know my staff and I
24 haven't, and I want to be out of here at 9:30, so let's go.
25 Ms. Baer.

1 MS. BAER: I will try to talk fast. Your Honor,
2 this is the debtor's 9019 motion to approve the settlement
3 agreement with Lloyd's Underwriters. There are several
4 objections that were filed to the settlement agreement. We
5 have spent a great deal of time and provided a tremendous
6 amount of information to the objectors, namely the Future
7 Claimants Representative, the Personal Injury Committee, and
8 the representatives of the Libby claimants to try to resolve
9 the objections. Unfortunately, we have not resolved all of
10 the objections, but I will try to quickly summarize where we
11 are at. Your Honor, there are essentially three issues that
12 are outstanding with respect to the settlement agreement.
13 Number one is the issue of whether the \$90 million is
14 adequate consideration for what is being done here. What we
15 are doing is, we are getting full payment from Lloyd's of all
16 of their obligations under certain asbestos-related insurance
17 policies. These were originally resolved in terms of
18 mechanism in a 1995 London agreement that included a lot of
19 insurers. This settlement would buy out, if you will,
20 Lloyd's obligations under the London agreement. The
21 settlement agreement does not apply to any other parties to
22 the London agreement. Your Honor, the debtors believe that
23 the \$90 million is adequate consideration, and the analysis
24 is really as follows: The \$90 million was structured based on
25 looking at the total obligations and then deducting from

1 there. Your Honor, with respect to the \$90 million, the
2 debtors did an analysis. The analysis begins with the fact
3 that the total amount of Lloyd's coverage was \$200 million.
4 Prior to the petition date, \$63.5 million was paid leaving
5 \$137.7 million of potential remaining coverage. Grace ran
6 calculations at various levels to determine how much they
7 could collect based on how many asbestos claims there were,
8 and then they discounted to present value. Your Honor,
9 Grace's calculations, which is shared with all the
10 Committees, showed that there would have to be an extremely
11 high level of liabilities, several multiples of what Grace
12 believes would be the allowed amount of asbestos liabilities
13 to fully exhaust the \$137.7 million in coverage. Here, Your
14 Honor, the settlement agreement is for \$90 million, which is
15 a discounted present value number, and also, Your Honor, will
16 include interest.

17 THE COURT: At what rate is the discount?

18 MS. BAER: Your Honor, the discount was 4 percent if
19 I recall correctly. But, Your Honor, again, the 137 million
20 is only if we reach this extremely high level of asbestos
21 claims. The \$90 million is based on a discount of that, on
22 what we think the claims may or could achieve.

23 THE COURT: But shouldn't I wait to see what the -
24 I'm going to be doing an estimation hearing. Shouldn't I
25 wait to see whether the claims really do come in at that

1 level?

2 MS. BAER: Your Honor, the problem is, Lloyd's is
3 willing to pay this amount now to cash out and be done. If
4 this goes on and the estimation goes on, several things could
5 happen. Number one, they could decide not to give us even
6 the \$90 million, which again, we believe is a very fair
7 settlement amount, and litigate the issue of how much they
8 should ultimate pay. Number two, the London - the various
9 London carriers have been falling rather quickly. We've had
10 a lot of insurance insolvencies. This is a very fair number
11 for what is being settled here, and in fact, I think the
12 objectors don't really disagree with the \$90 million, but for
13 one thing that I haven't gotten to yet, and that is not only
14 does this cover the regular asbestos claims, it also covers
15 this premises liability.

16 THE COURT: Right.

17 MS. BAER: But, Your Honor, the objectors indicate
18 that the premises liability is some \$200 million theoretical
19 availability. The fact of the matter, Your Honor, is the
20 premises coverage is a misnomer. It will render zero to the
21 estate, and this is the reason why. Under prevailing law,
22 Your Honor, it's impossible to recover under premises
23 liability because under prevailing law the layers are at such
24 high levels and it would be spread out over time in such a
25 way that the per occurrence for each claimant we covered is

1 multiple, multiple excesses of what anybody ever thinks a
2 claim would be covered at. The only way to access the
3 premises liability coverage, would be contrary to the law
4 that applies here, namely New York law, because the law in
5 New York is essentially that these claims are taken by each
6 occurrence, however, in order to prevail on the premises
7 liability coverage we would have to prove that it's one
8 occurrence, and that, Your Honor, would be shooting Grace's
9 foot - shooting itself in the foot. The one occurrence
10 argument would preclude Grace from then collecting insurance
11 from other insurers at much higher levels. The amount
12 available from other insurers to pay these claims if it is
13 not one occurrence but per occurrence, is much more
14 significant. Therefore, Your Honor, it would make no sense
15 whatsoever to even try to convince a New York court to go a
16 different way besides the fact that it's not very likely
17 because the law is quite well settled.

18 THE COURT: But the policies are not broken down so
19 that x-dollars apply to premises and x-dollars apply to
20 personal injury; right? It's just another 137 million of
21 coverage that's maximally available.

22 MS. BAER: That's correct, Your Honor.

23 THE COURT: Okay, then, that's a pretty steep
24 discount when at this point I'm going to be going through all
25 the property damage claims, so they should get resolved in

1 one fashion or another, and I'm going to be doing a personal
2 injury estimation. I mean the entities that will stand to
3 benefit from this are the creditors in the case, and they're
4 pretty much unanimously opposed to this settlement.

5 MS. BAER: Well, again, Your Honor, first of all
6 this does not affect property damage claims in any way,
7 shape, or form.

8 THE COURT: Right.

9 MS. BAER: It only affects personal injury claims,
10 but, Your Honor, if you would leave it out, 137.7 discounted
11 to present value I think is around 107 million. This is a
12 \$90 million settlement, and -

13 THE COURT: Well, that's still a lot of money.

14 MS. BAER: - but again, Your Honor -

15 THE COURT: People live on the difference between
16 \$90 and a \$107 million.

17 MS. BAER: But you only get to the 107, if you will,
18 if you prove the liabilities are at a multiple of where we
19 believe the liabilities are. In fact a range higher than the
20 ranges that the experts for the PI Committees have cited so
21 far. So, that the bottom line is, we don't think we'd ever
22 get there. Under the circumstances, the belief is that the
23 \$90 million is fair and adequate coverage. Your Honor, there
24 are two other issues. The two other issues are really
25 interrelated. One of them is you're asking the trust, the

1 524(g) trust that ultimately will be formed here, to give
2 documents, to have obligations to indemnify Lloyd's in
3 circumstances where you're not giving the trust the money.
4 And a related issue is even if we can get over that issue, we
5 don't want to give an indemnity to Lloyd's of any kind, "we"
6 meaning the trust. Your Honor, the way this document is
7 structured, this settlement will only become final, the
8 trigger date will only occur if a 524(g) trust is confirmed
9 in a plan and that 524(g) trust calls for a channeling
10 injunction and that 524(g) trust channels these claims to the
11 trust. In other words, the trust will be paying these
12 claims. Your Honor, it doesn't matter if it's this money
13 that's funding the trust or other money, money is fungible.
14 The point is, in order to get to this trigger date and get
15 this money to the benefit of whoever it's going to get, Your
16 Honor's going to have to confirm a plan, and it's going to
17 have to go effective, that has this channeling injunction,
18 which means, you're going to have to have determined that the
19 trust that's being set up will be adequately funded. Again,
20 doesn't matter where the money comes from, whether it's this
21 money or other money or Grace stock or whatever, the fact of
22 the matter is, the trigger vote will never occur unless a
23 plan is confirmed and that plan has a trust in it that fully
24 takes care of these claims. As a result, the idea of we have
25 to now decide who gets the money, is not necessary. You will

1 decide who gets the money in the context of what kind of a
2 plan is confirmed and what the funding is for the trust. In
3 the meantime, this \$90 million will sit in an escrow account
4 earning interest. By the time you confirm the plan, it won't
5 be 90 million, it will be 90 million plus interest, and then
6 the 90 million will be available for whoever gets the money.
7 It could be the trust or the money may go to reorganized
8 Grace because reorganized Grace is funding the trust in a
9 different manner other than with things like this cash
10 account. Under those circumstances, Your Honor, we do not
11 believe there's any problem with the way the order is drafted
12 now, that essentially reserves the issue of who gets the
13 money. The third issue, indemnity. Under the settlement
14 agreement the indemnity that is in there for Lloyd's is
15 rather all-encompassing.

16 THE COURT: Yes, it is. It doesn't even exclude
17 fraudulent activity and criminal activity.

18 MS. BAER: Understood, Your Honor.

19 THE COURT: That is not going to be approved.

20 MS. BAER: Reorganized Grace agreed to an all-
21 encompassing indemnity, which is rather consistent with other
22 settlements, it's done with other insurance carriers.

23 THE COURT: If I have approved one that doesn't
24 include - where there has been an indemnity required, that it
25 does not include one for fraudulent conduct and criminal

1 conduct, I'm not aware of it, but point them out to me, I'm
2 going to strike the orders and do it again.

3 MS. BAER: Your Honor, it raises two issues. Number
4 one, will you approve that kind of an indemnity being given
5 by reorganized Grace? And number two, will you make that
6 kind of an indemnity effective as to the trust? We have had
7 discussions with the trust about carving back on that
8 indemnity. In fact, Mr. Wyron and I were having some
9 discussions at one of the breaks to try to figure out what we
10 can do. The trust has indicated that they are willing - the
11 trust - I should say the claimants who - Committee members
12 ultimately would be likely to be involved in the trust have
13 agreed that they -

14 MR. WYRON: Your Honor, I object. We're talking
15 about settlement discussions here.

16 MS. BAER: Your Honor -

17 MR. WYRON: (Microphone not recording.)

18 THE COURT: Okay, fine.

19 MS. BAER: I'm sorry, Your Honor. I didn't mean to
20 do that, and I apologize. The point I wanted to make is the
21 indemnity is being given by reorganized Grace, it becomes
22 effective as to the trust when the trust becomes a party to
23 the agreement. We had notes all-encompassing. There are
24 ranges in terms of what we could do with the indemnity.
25 We've talked about that. We have not resolved it. Given what

1 Your Honor has said, we would frankly appreciate your
2 direction as to what you will permit and what you will not
3 permit.

4 THE COURT: Well, I will not permit that broad an
5 indemnity that is going to provide an indemnity regardless of
6 whether or not the conduct is based on some malfeasance,
7 misfeasance, gross malfeasance and gross misfeasance on
8 behalf of the - I'm not sure. I guess in this instance the
9 insurance company. I am not going to approve that. That's
10 way too broad.

11 MS. BAER: And, Your Honor, the issue I think will
12 be as whether or not the indemnity that you will approve will
13 apply to the trust or not.

14 THE COURT: All right. I think if the settlement is
15 approved, then I think all parties are going to be bound by
16 it, and that would include the indemnity, but at this point
17 in time, I'm just not so sure that the settlement approval
18 right now is in the best interest of the estate based on -
19 number one, I'm not really sure anybody is objecting to the
20 90 million or the discount rate per se. I think there was an
21 objection with respect to the property issue. Maybe that's
22 something that can get resolved, I'm not sure. But with
23 respect to the overall process right now, if the property
24 issue is resolved, and no one is objecting to the 90 million,
25 then maybe it is in the best interest of the estate, but if

1 those two issues are not resolved, and it's the creditors
2 regardless of who ends up with this specific pot of money,
3 specific pot of money, it's still the creditors who at some
4 point are gong to be paid their claims through some funds of
5 the debtor. So, just to make it simple, let's assume it's
6 these funds, it's their interest that's at stake. So, if
7 they're unhappy and they want to take the risk litigating
8 with Lloyd's, I guess maybe they can take the risk litigating
9 with Lloyd's.

10 MS. BAER: Your Honor, there's one problem with that
11 though. The debtors are effectively now able to get \$90
12 million from Lloyd's, and one way or another, when we are
13 factoring in what the trust has to be funded with, we can now
14 factor in that we would have \$90 million to compensate for
15 these claims. We don't know if at the end of the day that
16 \$90 million will still be available. The debtor can get that
17 for the basic wholeness, the basic everybody's interested now
18 at 90 million. If we take the chance of not doing the
19 settlement now, and later on Lloyd's is only willing to pay
20 70 million, the debtors may end up being the ones paying the
21 difference, Your Honor, because we've got to fund the trust.

22 THE COURT: Well, I understand that.

23 MS. BAER: We don't want to take that risk at - if
24 they want to take a risk with our money, that's
25 inappropriate.

1 THE COURT: Well, okay. Why is there a reduction
2 from 170 million if that's the appropriate present value rate
3 down to 90? I really don't understand how I get that \$17
4 million -

5 MS. BAER: Because, Your Honor, that 107 million
6 which is the discounted present value of the total amount
7 that could possibly be paid, we don't believe we'll ever get
8 there because of the large number of claims that would have
9 to be allowed in order to ever get to the maximum coverage.

10 THE COURT: Yes, but -

11 MS. BAER: What you're saying is that you can only
12 settle if Lloyd's pays the entire amount of the outstanding
13 insurance discounted to present value.

14 THE COURT: That would be preferable, yes.

15 MS. BAER: We can't agree - we can't disagree with
16 you on that, but that's not what they're willing to pay, and
17 the risk is they'll be willing to pay even less later on.
18 The estimation will come in even lower later on, and they
19 won't pay that much.

20 THE COURT: But they're not - Their liability isn't
21 going to be determined by the estimation. It's going to be
22 determined by - assuming that there isn't a settlement of
23 their policy rights, it's going to be determined by whatever
24 they can either lose or approve, however it turns out in the
25 tort system when claims are filed against it. Their exposure

1 is 137 million, and they're getting one heck of a deal to try
2 to discount it down to 90 million even though it's a payment
3 in advance through this policy.

4 MS. BAER: No, Your Honor. They'll never - This is
5 a high-level policy. You have to get through other policies
6 first. They'll never get to the 137 million -

7 THE COURT: Well, that's -

8 MS. BAER: - unless the claims go at some wild
9 amount.

10 THE COURT: Well, I mean, what's a wild amount? In
11 other cases with similar claims, they've been estimated in
12 the billions of dollars. Does the debtor have billions of
13 dollars worth of insurance before it gets to Lloyd's?

14 MS. BAER: Your Honor, the point is, this is a
15 compromise. That's what settlements are. This is a
16 compromise because the claims could be higher, the claims
17 could be lower. It was the debtor's belief that this was
18 frankly an excellent deal based on where we would be in the
19 coverages and what the possible claims could be. It is a
20 compromise. Lloyd's is not offering to pay the full amount
21 of their policy. No insurance carrier ever does in order to
22 resolve something when you don't know what the full amount of
23 the liability will be.

24 THE COURT: Obviously, that's the case in the
25 settlement, but there is - you know, if you tell me that

1 present value is X, and then you're going to discount it
2 below present value, I sort of need to know why. You're
3 telling me that it's because this is very high level policy,
4 and the debtor has lots of insurance below it, but the lots
5 of insurance below it is dependent on whether or not the
6 claims estimation comes out at a number that the debtor can
7 fund with applicable insurance below this, and I don't have
8 any way of evaluating that right now.

9 MS. BAER: Your Honor, it can come out the other way
10 too.

11 THE COURT: Yes.

12 MS. BAER: You keep assuming that we will always get
13 to the full amount of this coverage.

14 THE COURT: No, I don't.

15 MS. BAER: That is -

16 THE COURT: If you don't get to the full amount of
17 the coverage, then you don't need it because the claims will
18 have come in much lower and you won't have access to the
19 insurance policies and they won't have any obligation to pay
20 it.

21 MS. BAER: But that's the whole point. We can get
22 \$90 million right now. It's a tremendous amount of money.

23 THE COURT: It is a tremendous amount of money.

24 MS. BAER: And, Your Honor, from the debtor's
25 perspective, we have run the numbers. Our business people

1 believe that it is an excellent result, and we are very much
2 supportive of the settlement agreements. We can bring this
3 cash in and have the cash to fight over not a possibility.

4 THE COURT: All right.

5 MR. PASQUALE: Your Honor, if I may, while they're
6 chatting. Ken Pasquale for the Creditors Committee. Just to
7 address the Court's concerns, our professionals did - our
8 advisors did look at this very carefully and did get
9 comfortable with the amount and the discount rate and all of
10 those factors that are of concern to the Court.

11 THE COURT: All right, thank you.

12 MR. HORKOVITCH: Good evening, Your Honor. Bob
13 Horkovitch (phonetical) insurance counsel to the Asbestos
14 Personal Injury Claimants Committee. This has been objected
15 to by the Personal Injury Committee, the Property Damage
16 Committee, which does have an interest in this, which I'll go
17 into in a moment, the Libby claimants, and the Futures
18 Representative. One of the concerns, Your Honor's identified
19 is the indemnity and there are problems with this agreement,
20 which I understand has now been signed, beyond the
21 malfeasance. Now, if I can look at the indemnity provision
22 for a moment on the Elmo.

23 THE COURT: Could we move it up, because truly
24 folks, we are going to be out of here in 15 minutes. If I
25 need to start this tomorrow morning, we'll continue it until

1 tomorrow morning, but we've got 15 minutes, not one second
2 further.

3 MR. HORKOVITCH: I appreciate Your Honor's case
4 management . . . (microphone not recording).

5 THE COURT: Let's just go, please, with this.

6 MR. HORKOVITCH: This is the actual indemnity
7 provision that they want Your Honor to approve, and there's
8 an indemnity for all claims, and that's a term I'm going to
9 go into in just a moment, and it's indemnity even going
10 beyond the injunction. Your Honor, our position is is that
11 even if Your Honor wanted to approve this agreement, you
12 couldn't because this has by its definition, has the trust
13 providing an indemnity beyond 524(g) . . . (microphone not
14 recording).

15 THE CLERK: You have to use the microphone or it
16 won't be on the record.

17 MR. HORKOVITCH: Some examples, Your Honor, of the
18 indemnity go to putative damage, putative or other injury or
19 damage including noise induced hearing loss, government
20 claims and actions, other assertions of liability of any
21 kind, environmental claims. They're having the trust, a
22 524(g)'s trust whose purpose is to pay asbestos claims become
23 the subject of an - will pay an indemnity for environmental
24 claims, governmental actions, noise induced claims -

25 THE COURT: And I agree, let me cut it off. That's

1 inappropriate to the extent that the trust has to be somebody
2 that's going to indemnify the claims it's going to have to be
3 for claims that are presented to the trust, although, if the
4 debtor wants to try a 105 injunction, for example, if there
5 are noise-induced hearing loss claims that are going to be
6 filed against the debtor and the debtor wants to do something
7 else, I think that's appropriate, but this trust is not in a
8 position to be able to indemnify an insurance company for
9 something other than the claims that will go through the
10 trust. I agree, and I won't approve that.

11 MR. HORKOVITCH: Thank you, Your Honor. The
12 indemnity also goes beyond Grace to any entity even that
13 Grace does not have control of including former subsidiaries,
14 predecessors in interest, sellers, purchasers of assets. For
15 example, the Scott Company that made pesticides and
16 vermiculite and all the claims against Scott Company for
17 vermiculite would be sucked up in here. There are claims
18 against Iquitos (phonetical) would be indemnified by the
19 trust. Companies that Grace does not have control over would
20 be indemnified by the trust, any equitized liability for that
21 -

22 THE COURT: Same ruling.

23 MR. HORKOVITCH: Thank you, Your Honor.

24 THE COURT: Okay. With respect to the trust, the
25 ruling is, the trust is not - I think cannot, probably, as a

1 matter of law based on what its function is supposed to do,
2 create an indemnity for something that's not part of its
3 liability at the outset.

4 MR. HORKOVITCH: One very quick point on the
5 disconnect between the next point on the payments and
6 reporting requirements. I understand Grace would like the
7 \$90 million, and I understand that \$90 million is a lot of
8 money, and I understand that we would like Iquitos to rid
9 itself of \$90 million. We'd also like to have it in an
10 escrow account. We'd like to have - the agreement right now
11 doesn't specify escrow account, but simply says a - it says a
12 bank - I'll get the exact language - It should be put in a
13 bank trust agreement or in an escrow agreement acceptable to
14 Grace and Lloyd's, no one else, and it refers, Your Honor, to
15 the last page of the agreement which they ask Your Honor to
16 approve of the actual agreement for the settlement account
17 agreement, and it's blank. We don't know what they're doing
18 with the money, Your Honor.

19 THE COURT: Well, I'm not sure that it makes a
20 difference if it's in a bank trust agreement or in an escrow
21 agreement provided that the beneficiaries are identified;
22 does it?

23 MR. HORKOVITCH: Well, what we'd like is the
24 beneficiary to be the trust. What we'd like is we would like
25 it to be specified as other than just money going to Grace.

1 THE COURT: I can't make the beneficiary the trust.
2 There is no trust.

3 MR. HORKOVITCH: An escrow account for the benefit
4 of the trust.

5 THE COURT: I cannot make the trust the beneficiary
6 if there is no trust. There won't be a trust unless and
7 until there is a confirmed plan.

8 MR. HORKOVITCH: Or at least an escrow account for
9 dedication for payment for asbestos claims.

10 THE COURT: Well -

11 MR. HORKOVITCH: As opposed to noise-induced claims,
12 environmental claims, governmental claims -

13 THE COURT: I don't know what's covered by the
14 policy. If those claims are covered by the policy and they
15 have a right to access it, then they ought to be part of the
16 escrow.

17 MR. HORKOVITCH: An escrow dedicated to claims
18 covered by the policy.

19 THE COURT: Fine.

20 MR. HORKOVITCH: Okay. Would be better than just
21 being able to use it for Grace's operating.

22 THE COURT: Well, it shouldn't be used for Grace's
23 operating expenses. I mean, to the extent that Grace
24 actually funds the trust and other claims through some other
25 sources, I think at that point there should be a reversionary

1 right back to the debtor, but the initial beneficiaries ought
2 to be the creditors of the estate, I agree.

3 MR. HORKOVITCH: Thank you, Your Honor.

4 THE COURT: Creditors entitled to a distribution
5 through the policy, let me make it specific.

6 MR. HORKOVITCH: Your Honor, the - our only point on
7 the reporting requirements objection is that the trust was
8 without any dedication of the funds for the trust or even for
9 use under the policies, the trust was being required to
10 provide reports to Iquitos regarding these asbestos claims,
11 expressly as part of the agreement so that Iquitos could make
12 reinsurance claims based on asbestos liabilities, and if the
13 money isn't being used for asbestos liabilities, it is
14 improper to use this Court's approval of this settlement so
15 that Iquitos can say, I'm entitled to reinsurance proceeds
16 for an asbestos liability. Now, if it's a covered liability
17 under the policy, that would ease the requirement, that would
18 ease our concern about reporting requirements. But if Grace
19 is using it for purposes other than covered by the policy it
20 makes this Court's blessing and the use of this Court's
21 blessing improper when Iquitos is going to be using this
22 Court's blessing for using it for reinsurance purposes to
23 assert a the reinsurance claim when it may not have anything
24 to do with the policy. So, Your Honor's instruction is very
25 -

1 THE COURT: If this is a buyout of the policy, how
2 does Iquitos have a reinsurance claim?

3 MR. HORKOVITCH: Iquitos is going to tell its
4 reinsurers that it is paying this money for asbestos claims
5 or other claims under the policy.

6 THE COURT: Oh, for its own reinsurance not related
7 to the debtor's claims.

8 MR. HORKOVITCH: For it's own reinsurance, that's
9 correct.

10 THE COURT: Oh, okay.

11 MR. HORKOVITCH: Yes, Your Honor. Just a couple of
12 quick points that were in error. Property damage claims are
13 impacted here. Property damage claims are covered by CGL
14 policies, just like bodily injury claims are, and people who
15 have property damage because of asbestos are able to make
16 claims against the policies. So the PD's objection is well
17 stated.

18 THE COURT: Well, I think on that one, Ms. Baer's
19 made a very logical construction that it may be cutting off
20 your nose to spite your face if you take the position on one
21 policy that this is a single event whereas for the other
22 policies you have to take an opposite position.

23 MR. HORKOVITCH: Here's our point. We agree that
24 there is a primary layer underneath Iquitos. Iquitos then
25 comes in a first-layer umbrella form and also in the middle

1 and up on top. Lloyd's is all over the map in Grace's
2 coverage program. Mr. Posner (phonetical) has said if you
3 take a one-occurrence position which he disagrees with, we
4 disagree with, Grace disagrees with. We think that a one-
5 occurrence position is wrong, but if it's taken then a whole
6 separate line of coverage for premises liability, not the -
7 there's a separate line of coverage for premises liability
8 and a separate line of coverage for products completed
9 operations coverage. The separate line of coverage is
10 impacted by \$12.7 million if you have \$500 million in
11 premises claims. That's \$12.7 million in coverage that would
12 be given up. Twelve million dollars of receipts that will be
13 given up if you have \$500 million in premises liability.

14 THE COURT: But the sole coverage, the total
15 coverage is 137 million.

16 MR. HORKOVITCH: No.

17 THE COURT: No.

18 MR. HORKOVITCH: No. There's a \$137 million of
19 coverage for products in completed operations coverage.

20 THE COURT: All right.

21 MR. HORKOVITCH: And Lloyd's has \$200 million of
22 separate premises coverage. All of that's being given away
23 for \$90 million.

24 THE COURT: Well, look -

25 MR. HORKOVITCH: Okay.

1 THE COURT: I go back to what I said before. If you
2 folks aren't happy with the economic terms of this, it seems
3 to me that this policy stands for the benefit of the
4 creditors who can access it. Do you want to take your
5 chances and, you know, Lloyd's may go under or that they'll
6 not sweeten the deal or that you're going to litigate with
7 Lloyd's till the cows come home, far be it for me to stop
8 you. I'm not sure in this instance that given the
9 indemnities and given the very deep discount that this is in
10 the best interests of the estate. I understand the Equity
11 Committee and that the debtors think it is, but I'm not sure
12 that the Equity Committee will get a dime out of this policy
13 at this point in time anyway. It doesn't stand for their
14 benefit. It stands for the benefit of the creditors. So, if
15 you're unhappy -

16 MR. HORKOVITCH: I think we probably would like to
17 talk with Grace further - talk with the other Committee
18 members and talk with Grace further about that specific point
19 and see where we are with regard to the dedication of these
20 funds for covered claims.

21 THE COURT: Well, I think you probably should talk
22 because I think this is a good deal from Lloyd's perspective
23 and it's probably not going to be open for very long.

24 MR. HORKOVITCH: Okay. Mr. Wyron for the Futures
25 Rep also wanted to address certain issues with regard to the

1 indemnity.

2 THE COURT: More issues on the indemnity?

3 MR. WYRON: No, Your Honor. Richard Wyron for the
4 Futures Rep. You understood our point perfectly. I don't
5 need to address it, with one caveat, that is, I take it Your
6 Honor's is going not deny approval of this motion as it's
7 been presented.

8 THE COURT: I am going to continue this motion to
9 let you folks see if you can go work out some sort of deal
10 because 90 million birds in the hand seems to me to be a
11 whole lot of worth something.

12 MR. WYRON: As long as there's no liability on the
13 trust, we may well agree with you, and we'll try to work it
14 out.

15 THE COURT: Well, there may be some liability for
16 the trust. I mean, I'm not saying that the trust can skate
17 totally free because you will have some indemnity obligations
18 with respect to claims that can be presented against it.

19 MR. WYRON: I think that's a matter of discussion.
20 I reserve my rights to address that when we figure out what
21 this deal really should look like.

22 THE COURT: All right. Do you want -

23 MR. WYRON: Thank you, Your Honor.

24 THE COURT: - this continued to my next hearing in
25 Pittsburgh so it's sooner than the next omnibus?

1 MS. BAER: Your Honor, you have a rather full agenda
2 for 9/11.

3 THE COURT: All right.

4 MS. BAER: Because you have exclusivity and because
5 you have the motion to compel. I think it probably makes
6 sense unless Iquitos disagrees since they're the ones who
7 have been anxious to give us this money and be done, that
8 maybe it would be better to put it on the September 25th
9 hearing. We have a lot to do in the next two weeks, and I'm
10 afraid this is not going to get pulled off by 9/11.

11 THE COURT: All right, that's fine. If Iquitos
12 agrees to continue it to September 25th, it seems fine to me.

13 UNIDENTIFIED SPEAKER: Your Honor, that's fine from
14 Lloyd's Underwriters' perspective.

15 THE COURT: All right.

16 MS. BAER: Your Honor, just a couple of points. We
17 are not that far off. We have done a tremendous amount of
18 talking here. Frankly, the indemnity issue is one of the
19 biggest issues and your guidance is very helpful, and I think
20 it will aid the discussions tremendously.

21 THE COURT: Okay. Is there anything else we need to
22 address tonight?

23 MS. BAER: Your Honor, I have one order we need you
24 to enter. There was a withdrawal of the claim and a
25 stipulation and the order never got entered.

1 THE COURT: I'll take it. Thank you.

2 MR. BAENA: We've got five more minutes, Judge.
3 Could we do exclusivity?

4 THE COURT: Sure. Talk fast Mr. Baena. Preferably,
5 let's adjourn to the bar and we'll all talk there, but not
6 about exclusivity. Okay, that order is entered and I'll see
7 you in Pittsburgh.

8 MS. BAER: Thank you, Your Honor.

9 MR. BERNICK: Your Honor, this is probably not a
10 great record to set, but we've probably set the record and
11 speaking I'm sure for all constituencies, we very much
12 appreciate Your Honor's stamina and patience in going through
13 the agenda.

14 THE COURT: Well, likewise, and I'm sorry it's so
15 long. I hope we don't have to do another one of these
16 marathons, but I thought if we didn't get through this, we'd
17 just continue to be continuing things, and at some point we
18 have to get it caught up, so. I hope you all have a safe
19 journey home.

20 (Remainder of page intentionally left blank.)

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1 ALL: Thank you, Your Honor.

2 THE COURT: Good night.

3 (Whereupon at 9:41 p.m. the hearing in this matter
4 was concluded for this date.)

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19 I, Elaine M. Ryan, approved transcriber for the
20 United States Courts, certify that the foregoing is a correct
21 transcript from the electronic sound recording of the
22 proceedings in the above-entitled matter.

23

24 /s/ Elaine M. Ryan August 27, 2006
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